159-78

# CERTIFICATE.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 1021.

THE UNITED STATES, APPELLANT,

vs.

JAMES M. BURR AND CHARLES C. HARDWICK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

**FILED MAY 17, 1895.**

**(15905.)**

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1 United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
*vs.*
JAMES M. BURR AND CHARLES C. Hardwick, appellees. } Suit No. 2100.

*Certificate for instructions.*

*To the Supreme Court of the United States:*

A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered on the 16th day of January, 1895, by which it was ordered, adjudged, and decreed that there was error in the decision of the Board of General Appraisers in this cause, and that said decision be, and the same is hereby, in all things reversed, and that the merchandise in question was properly dutiable as cotton laces at 50 per cent ad valorem under par. 276, Schedule J, act of August 28th, 1894, and that the entry be reliquidated accordingly, and an appeal having been taken from said judgment or decree to this court by the above-named appellants, the United States, and the cause having been placed upon the calendar of this court and reached for argument, and the record therein having been printed and filed on Feb. 18, 1895, from which it appears that certain questions of law therein are involved con-
2 cerning which this court desires the instruction of the Supreme Court of the United States, the following facts from which the said questions arise are herewith submitted and certified as follows:

1. Certain merchandise, consisting of cotton laces, was imported from a foreign country into the port of New York by the appellees per "La Navarre." The vessel arrived on August 7th, 1894, and the goods were entered by them for consumption at the port of New York on August 8th, 1894. The merchandise was classified for duty by the collector of customs at said port, and duty at the rate of 60 per cent ad valorem was assessed thereon, under the provisions of par. 373 of Schedule J of the tariff act of October 1st, 1890, which was then in force.

2. The duties so assessed were paid by the said importers on August 8th, 1894. The goods were delivered to the importers on August 11th, 1894.

3. On August 28th, 1894, the entry of the said merchandise was liquidated at the custom-house as entered, that is to say, without any change of the duties from those assessed at the time of entry.

4. On September 7th, 1894, the following protest was filed by the appellees, importers, at the custom-house at New York:

NEW YORK, *Sept.* 7, 1894.

Hon. JAMES T. KILBRETH,
*Collector of Customs, New York:*

SIR: We hereby protest against your assessment of duties as made by you on our importation below mentioned, consisting of certain cot-
3 ton laces, contained in the cases or packages marked and numbered as described on the entries and invoices thereof, to which for more certainty of description reference is hereby had, claiming because

said goods were imported on or after August 1st, 1894, that they are dutiable at 50 % ad valorem, under paragraph 276, Schedule "J," of the tariff act of August, 1894, and not at 60 % ad val., under act of October 1, 1890, or as charged by you; and we give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion, and to obtain possession of our goods. We claim that the duty exacted by you is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

| Vessel. | From. | Date of entry. | Entry No. | If wareh'se. W. H. bond. | Date of liquidation. | Marks & Nos. of pkgs. |
|---|---|---|---|---|---|---|
| La Navarre..... | Havre .... | Aug. 8, '94 | 114313 | C. | Aug. 28, '94 | B. H-1455 and others as per invoices and entries. |

BURR & HARDWICK.

CURIE, SMITH & MACKIE,
*Attorneys*, 44 & 46 *Exchange Place, N. Y.*

*To the Board of General Appraisers:*

We hereby give notice that we are prepared to substantiate by proof every allegation of fact contained in the within protest, and claim the right to a reasonable notice from your board of the time and place when an opportunity will be affor'ed us to furnish such proof.

CURIE, SMITH & MACKIE,
*Attorneys for Importers.*

5. The Board of United States General Appraisers, under the provisions of sec. 14 of the customs administrative act of June 10, 1890, affirmed the decision of the collector, and held that said goods were properly dutiable under par. 373 of the act of October 1st, 1890.

4 6. From this decision of the Board of U. S. General Appraisers the importers, appellees, applied to the circuit court of the United States for the southern district of New York by petition, praying for a review of said decision, pursuant to sec. 15 of said act of June 10, 1890, and the said circuit court upon said petition ordered the Board of U. S. General Appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, and the said Board of General Appraisers thereafter made such return in response to said order of the court.

7. Evidence was taken in said circuit court before one of said general appraisers as an officer of the court as to the legislative history of said act of August 28th, 1894:

(a) That the bill was introduced in the House of Representatives on December 19, 1893, House bill H. R. 4864.

(b) That it passed the House of Representatives on February 1st, 1894.

(c) That as it then passed the House of Representatives the date in secs. 1 and 2 was as follows: "On and after the first day of June, 1894, unless otherwise specially provided for in this act," etc.

(d) That the bill was laid before the Senate February 2, 1894, and referred to the Finance Committee.

(e) That the bill was reported by the Finance Committee on March 20, 1894.

(f) That secs. 1 and 2 of said bill when so reported contained the date of the 30th day of June, 1894, instead of the 1st day of June, 1894.

(g) That said bill as amended by the Senate passed the Senate on July 3, 1894.

5 (h) That when it passed the Senate the date contained in the first and second sections thereof was August 1, 1894, instead of the 30th day of June, 1894.

(i) That the bill as amended in the Senate finally passed the House on August 13, 1894, without change, after a long discussion and deliberation by the committees of conference.

(j) That on August 15, 1894, having received the signatures of the presiding officers of both Houses, the bill was sent to the President of the United States.

(k) That on August 28th, 1894, the bill was sent by the President to the Secretary of State, and the following endorsement was made thereon:

"Note by the Department of State. The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.

H. R. No. 4864.—An act to reduce taxation, to provided revenue for the Government, and for other purposes.

August 28th, 1894."

8. It was also then and there stipulated that the persons composing the firm of Burr and Hardwick, the importers, are James M. Burr and Charles C. Hardwick; and further that the merchandise in controversy in this case consists of cotton laces; that said merchandise, if dutiable under the act of October 1st, 1890, is dutiable at 60 per cent ad valorem, under the provision for cotton laces contained in par. 373, Schedule J, of said act; and if said merchandise is dutiable under the act of August 28th, 1894, it is dutiable at 50 per cent ad valorem under the provision for cotton laces in par. 276, Schedule J, of said act.

9. The case thereafter came on to be tried upon the record as above set forth before Hon. Hoyt H. Wheeler, district judge, holding the

6 said circuit court, who, after hearing argument rendered an opinion filed January 15th, 1895, reversing the decision of the Board of General Appraisers herein, and judgment was thereupon made and entered as herein above set forth, from which decision and judgment the present appeal was taken by the United States to this court.

Upon these facts this court for the proper decision of said cause desires instruction upon the questions of law following, that is to say:

(1) Should the assessment for duty of the merchandise described in the foregoing statement of facts, under paragraph 373 of the act of October 1st, 1890, be sustained, notwithstanding the provisions of the tariff act of August 28th, 1894?

(2) Should the said merchandise described in the foregoing statement of facts be assessed for duty under paragraph 276, Schedule J, of the tariff act of August 28th, 1894?

(3) Should the rates of duty prescribed by the first section of the tariff act of August, 1894 (unless otherwise specially provided for in said act), be levied, collected, and paid upon all articles imported from foreign countries or withdrawn for consumption on and after August first, 1894, and prior to August 28th, 1894?

And to that end this court hereby certifies such questions to the Supreme Court of the United States.

WM. J. WALLACE, *Circuit Judge.*
E. HENRY LACOMBE, *Circuit Judge.*
NATHANIEL SHIPMAN, *Circuit Judge.*

7 (Indorsed:) "A." Suit No. 2100. U. S. circuit court of appeals for the second circuit. United States against James M. Burr and Charles C. Hardwick. Certificate for instructions. Wallace Macfarlane, United States attorney, attorney for collector. United States circuit court of appeals, second circuit. James C. Reed, clerk. Filed May 16, 1895.

8 UNITED STATES OF AMERICA,
*Second Circuit, ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled The United States, appellant, vs. James M. Burr and Charles C. Hardwick, appellees (Suit No. 2100), was duly filed and entered of record in my office by order of said court on the 16th day of May, 1895, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] JAMES C. REED,
*Clerk United States Circuit Court of Appeals for the Second Circuit.*

Indorsement on cover: Case No. 15905. Term No. 1021. The United States, appellant, vs. James M. Burr and Charles C. Hardwick. U. S. circuit court of appeals, second circuit. Supreme Court, U. S., Clerk's office. Received May 17, 1895. (Certificate.) Filed May 17, 1895.

○

MAY 20 1895
JAMES H. McKENNEY,
CLERK.

CASE No.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES,
*Appellant,*
*against*
JAMES M. BURR and CHARLES C. HARDWICK,
*Appellees.*

## Brief of the United States, Appellant, on Certificate for Instructions from the United States Circuit Court of Appeals for the Second Circuit.

WALLACE MACFARLANE,
*Attorney for the United States*
*for the Southern District of New York.*

C. G. Burgoyne, Walker and Centre Streets, N. Y.

# In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES,
Appellant,

vs.

JAMES M. BURR and CHARLES C. HARDWICK,
Appellees.

**Brief of the United States on certificate for instructions from the Circuit Court of Appeals for the Second Circuit.**

In this case the U. S. Circuit Court for the Southern District of New York, by its judgment, filed January 16, 1895, reversed the decision of the Board of United States General Appraisers and of the Collector of Customs at the Port of New York.

From the decree of the Circuit Court the United States appealed to the Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals, desiring, for the proper decision of the cause, the instructions of the Supreme Court of the United States on certain questions or propositions of law, has certified to the Supreme Court such questions or propositions, pursuant to Section 6 of the Act of March 3d, 1891 (1 Supp. R. S., p. 901).

The opinions of the Circuit Court, of the General Appraisers and of the Solicitor of the Treasury are printed as appendices to this brief.

## Statement of the Case.

The certificate of the Circuit Court of Appeals shows the facts to be as follows:

Burr & Hardwick, importers (the appellees), made an importation of "cotton laces" per the "La Navarre," from Havre. The vessel arrived on August 7, 1894, and the goods were entered by them for consumption, at the port of New York, on August 8, 1894.

Duty thereon was levied and assessed by the Collector of Customs at said port, at 60 per cent. *ad valorem*, under the provisions of Schedule J, par. 373, of the Tariff Act of October 1, 1890, which was then in force. The duties were paid by the importers on August 8th (the same day). The goods were delivered to the importers on August 11, 1894. The entry was liquidated as entered on August 28, 1894. On August 28th, 1894, the Tariff Act of that year became a law, and on September 7th, 1894, the importers (appellees) filed their protest, claiming that said cotton laces were dutiable at 50 per cent. *ad valorem* under paragraph 276, Schedule J, of the Tariff Act of August, 1894, and were not dutiable under the act of October 1, 1890. The Board of U. S. General Appraisers affirmed the decision of the Collector. The importers appealed to the U. S. Circuit Court, under Sec. 15 of the Customs Administrative Act of June 10, 1890, and the return of the board was filed October 9th, 1894.

It appears also from the certificate that on December 19, 1893, Mr. Wilson, of West Virginia, reported to the House of Representatives, from the Committee on Ways and Means, a general tariff bill, which was numbered and designated as "Bill H. R., 4864." This bill, amended in some particulars, passed the House of Representatives on February 1st, 1894. The first section of the bill as it then passed the

House provided that "*on and after the first day of June, 1894*, unless otherwise specially provided for in this Act, there shall be levied, collected and paid upon all articles imported from foreign countries, or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, etc." Section 2 of said House Bill, as then passed, provided "*that on and after the first day of June, 1894*, unless otherwise provided for in this Act, the following articles, when imported, shall be exempt from duty."

On February 2d, 1894, the bill was laid before the Senate and referred to the Finance Committee. When the bill was reported to the Senate by the Finance Committee on the 20th day of March, 1894, *the thirtieth day of June, 1894*, was substituted as the date in the foregoing sections (1 and 2) for *the first day of June, 1894*. When it passed the Senate on July 3d, 1894, with the Senate amendments, sections 1 and 2 were amended by substituting the first day of August, 1894, for the thirtieth day of June, 1894, and in that form the bill was returned to the House of Representatives.

The Conference Committee of the House agreed to the bill on August 13, 1894, as passed by the Senate without any further amendment, and the bill was never thereafter sent back to, or in possession of, the Senate, and on the 15th day of August, 1894, having received the signatures of the presiding officers of both Houses, was sent to the President of the United States. On the 28th day of August, 1894, the bill was sent by the President to the Department of State, and the following memorandum was endorsed thereon:

> "The following-named bill having been presented to the President on the 15th inst, and not having been returned by him to the House of Congress, in which it originated, within the time prescribed by the Constitution of the United States, has become a law without his approval (H. R. No. 4864). An Act to reduce taxation, to provide revenue for the Government and for other purposes. August 28th, 1894."

The Constitutional provision referred to in this memorandum and applicable to the case is Art. 1, Sec. 7, Subdivision 2 of the Constitution of the United States. Under this provision the bill became a law on August 28th, 1894.

It appears further from the certificate that the persons composing the firm of Burr & Hardwick, the importers, are James M. Burr and Charles C. Hardwick; and that the merchandise in controversy in this case consists of cotton laces; that said merchandise, if dutiable under hte Act of October 1st, 1890, is dutiable at 60 per cent. *ad valorem*, under the provision for cotton laces contained in paragraph 373, Schedule J, of said Act; and if said merchandise is dutiable under the Act of August 28th, 1894, it is dutiable at 50 per cent. *ad valorem* under the provision for cotton laces in paragraph 276, Schedule J, of said Act.

On these facts the Circuit Court of Appeals submits the following questions:

> (1) Should the assessment for duty of the merchandise described in the foregoing statement of facts under paragraph 373 of the Act of October 1st, 1890 be sustained notwithstanding the provisions of the Tariff Act of August 28th, 1894?
>
> (2) Should the said merchandise described in the foregoing statement of facts be assessed for duty under paragraph 276, Schedule J, of the Tariff Act of August 28th, 1894?
>
> (3) Should the rates of duty prescribed by the first section of the Tariff Act of August, 1894 (unless otherwise specially provided for in said act), be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption on and after August 1st, 1894, and prior to August 28th, 1894?

This (3d) question should not be misunderstood. It refers to articles imported or withdrawn and actually assessed for duty between August 1st and 28th under the Act of October 1, 1890. For the United States (appellant), it is contended that the answer to the first question should be *Yes*.

To the second and third questions, *No*.

## POINTS.

### I.

The collector's assessment of the merchandise for duty under paragraph 373 of the Act of October 1st, 1890, should be sustained, notwithstanding the provisions of the Tariff Act of August 28th, 1894.

The importers, the appellees in this case, imported certain foreign merchandise and entered it for consumption at the port of New York, on August 8th, 1894. Upon this merchandise, on August 8th, 1894, duties were lawfully levied and collected by the Collector of Customs at that port, and paid by the importers under paragraph 373 of the tariff then in force, that is to say, the Act of October 1st, 1890. They claim that by force of something in a subsequent tariff act which was "passed" or became a law on August 28th, 1894, they are entitled to have these duties *constructively* levied and collected again at the lower rates for such merchandise established by the new act, and to have the difference between the original *lawful* assessment and the later assessment paid over to them. This claim of the importers appears to be based upon the first section of the Act of August 28th, 1894, which reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely," &c.

The case does not present the question of an act relating back over a period during which there was no law dealing with the same subject. During the period

between August 1st and 28th there was another law in force, dealing with the same subject matter, and necessarily of continuous, daily operation until the very moment at which the new law superseded the old.

This is what makes the claim of the appellees so extraordinary. They contend that by force of the first section the act, though it did not become a law until August 28th, should be construed to relate back to August 1st, 1894, and nullify everything done under the previously existing law between August 1st and 28th. And this, though it is necessarily admitted that between August 1st and 28th the other law was lawfully enforced. Everything, it is claimed, that was done under the Act of October, 1890, between August 1st and 28th, 1894, *though necessarily and lawfully done*, must be nullified and done over again under the Act of August 28th, 1894.

There is nothing in the language of the first section of the Act of 1894 that provides any foundation for this contention of the appellees. The certificate states the history of the act, and shows that at every stage of its career the intention of Congress was that the tariff provisions of the bill should operate prospectively. This very date—"*the first day of August, 1894*"—(the certificate shows) was inserted in the bill when it passed the Senate on July 3d, taking the place of the earlier date, June 30th, for the very purpose of providing that the bill should go into force at a date subsequent to its passage.

Owing to the delay in Conference Committee this date—"*the first day of August, 1894*"—had passed before the House concurred in the Senate amendments; and as by such concurrence the bill never went back to the Senate, this date remained as originally fixed by the Senate on July 3d, 1894, and so went to the President and became a law on August 28th, by virtue of Article 1, Section 7, Subdivision 2 of the Constitution of the United States.

This explanation shows that it never entered into the mind of the Legislature that the bill should operate retrospectively.

The language of the first section of the act, "on and "after the first day of August, 1894, etc., there shall be "levied, collected and paid, etc.," is undoubtedly precise and certain. Indeed, there can be no dispute that Congress, in using this language, meant just what it said, provided the bill should become a law on or before that date. But that Congress *said* that the rates of duty provided in the new act should be levied on and after August first, 1894, by no means justifies the contention that Congress *intended* that if the bill did not become a law until after August 1st, 1894, it should be given a retroactive effect during the period between August 1st and the date of the actual passage of the bill into a law.

On the contrary, Congress, in the Act of August, 1894, did not repeal the Act of October 1st, 1890, until the date of the passage of the Act of 1894, but carefully continued existing laws until then; that is to say, until August 28th, 1894 (Sec. 72, Act of Aug. 28th, 1894, by which inconsistent laws are "*hereby*" repealed). This shows clealry that Congress intended the rates of duty prescribed by the Act of 1894 to be levied "on the first day of August, 1894," if the bill should then be a law; and, if not, then as soon after that date as it should become a law, and continued existing laws until a new law was ready to supersede them.

When the first day of August, 1894, arrived it was not possible *lawfully* to levy, collect and pay the duties prescribed by the first section of the Act of August, 1894. There was no law requiring that to be done, nor was there such a law at any time prior to August 28th. On the contrary, on the first day of August, 1894, and thereafter until August 28th, 1894, the law peremptorily required collectors to levy and collect and importers to pay the duties prescribed by the Act of October 1st, 1890. It was impracticable, therefore, after August 28th, 1894, to carry out the first section of the tariff act of that date according to its literal terms, at least in the sense contended for by the appellees.

This argument brings out clearly the extravagance of the arguments of the appellees. They say it is practicable to carry out the first section of the Act in the fol-

lowing manner: Nullify the lawful action of collectors under the Act of October, 1890, between August 1st and 28th, 1894. Assess our merchandise over again under the act of 1894. Don't levy and collect any duties thereunder, but if the new assessment amounts, under the Act of 1894, to a lower sum than the original lawful assessment under the Act of October, 1890, pay us back the difference.

For all this the statutory authority is the provision that the new rates of duty shall be levied, collected and paid "*on and after the first day of August, 1894*," in an act that did not become a law until August 28th following. These words used prospectively when the Legislature was speaking from a much earlier date—words in their very form prospective: "On and after, etc., there *shall* "be levied, collected and paid," etc., must be read, the appellees argue, to express a command that could have been intelligibly expressed by only such words as the following:

> On and after the first day of August, 1894, &c., there shall be levied, collected and paid, etc., the rates of duty herein prescribed, and, if this bill has not become a law by August first, then Collectors of Customs shall reliquidate, at the rates herein prescribed, all entries or withdrawals for consumption between August first, 1894, and the date of the passage of this act, and where the duties collected on such entries on and after August first and before the passage of this act exceed the amount that would have been payable under the provisions of this act, had it then been a law, the difference shall be refunded, &c., &c.

All this, in order to sustain the contention of the appellees, must be read into the first section of the Act of 1894.

## II.

Even if the Court should hold that the language of the first section is so clear and conclusive an expression of intention that it must be given a retrospective construction, still the assessment for duty under the Act of 1890 of the merchandise in question, and of all merchandise entered or withdrawn for consumption on and after August 1st, and prior to August 28th, 1894, should be sustained.

(1) It might be contended on behalf of the United States with greater force than there is in the argument of the appellees, that the first section of the Act of August, 1894, requires collectors to levy and collect, and importers to pay, the duties therein prescribed, on and after August first, 1894, wholly irrespective of any other payments made on and after August first, 1894, and before the bill became a law on August 28th; that on entries and withdrawals on and after August first, 1894, and prior to August 28th, 1894, the duties prescribed by that act must be levied, collected and paid at all events; and, if other duties had been levied, collected and paid under some other law on such entries, these new duties also must be levied, collected and paid in addition.

The statute simply says that on and after August first, &c., on such entries the rates of duty therein prescribed shall be levied, collected and paid. Nothing is said about other duties or reliquidating entries, or about paying back differences. There is not a shadow of authority in the act for setting off duties levied under its provisions against duties levied, collected and paid under a former act at higher rates and paying over the difference to the importer.

(2) The repealing clause of the Act of August, 1894, is Section 72, which is as follows:

> "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but the repeal of existing laws or modifications

thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications, but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. Any offenses committed and all penalties or forfeitures or liabilities incurred prior to the passage of this act under any statute embraced in or changed, modified or repealed by this act may be prosecuted or punished in the same manner and with the same effect as if this act had not been passed. All acts of limitation, whether applicable to civil causes and proceedings or to the prosecution of offenses or for the recovery of penalties or forfeitures embraced in or modified, changed or repealed by this act shall not be affected thereby; and all suits, proceedings or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this act, may be commenced and prosecuted within the same time and with the same effect as if this act had not been passed. And provided, further, that nothing in this act shall be construed to repeal the provision of section three thousand and fifty-eight of the Revised Statutes as amended by the act, approved February twenty-third, eighteen hundred and eighty-seven, in respect to to the abandonment of merchandise to underwriters or the salvors of property and the ascertainment of duties thereon."

This section speaks from the "passage of the act" (Bradbury vs. Robertson, 132 U. S., 491).

As a general rule an act takes effect from the time of its passage. By the passage of an act is meant the conclusion of all the constitutional forms and ceremonies requisite to make the act a law, including the signature of the Executive; or where such signature is not appended, the final passage of the act over a veto, or the arrival of the date when the bill becomes a law by experation of the period allowed the Executive by the Constitution for its return.

Endlich on the Interpretation of Statutes, Eighth Edition, Section 498, page 700, note 116.

Therefore, under this rule and the provisions of Section 7 of Article 1 of the Constitution of the United States the passage of this act was August 28, 1894, when it became a law. As by the terms of Section 72 inconsistent laws are "*hereby*" repealed, such laws are not repealed retroactively, but from and after the passage of the Act. Thererore, the Act of October, 1890, under which this merchandise was assessed for duty was in full force and effect between August 1st and 28th.

Now, during this period it was the only law under which it was practicable to assess duties. When the other and later law is applied to the same period there is, perhaps, nothing for it to operate upon.

The language of the first section is thus satisfied if the Court is unable to decide that the intention of Congress was that the act should be prospective only.

The fact that, giving the first section of the Act of 1894 a retrospective effect according to its terms, there is nothing for it to operate upon during the period of retrospect doesn't make it any the less a law, or any the less retrospective. There may be merchandise imported prior to August 28th not yet entered, or merchandise bonded before that date not yet withdrawn. As to such merchandise the first section, if construed retrospectively, might be effective, unless otherwise provided in the act. The other law (the Act of October 1, 1890) is thus given full force and effect up to the last moment of its existence on August 28th. In this manner the language of the first section of the Act of 1894 may be construed according to its precise terms and the act held to be retrospective, while, at the same time, everything done under the Act of October 1st, 1890, until it was repealed on August 28th, may be sustained and reconciled with the provisions of the later act.

## III.

**Rules of statutory construction of peremptory application, especially in respect to statutes imposing taxation, require such a construction of the Tariff Act of August, 1894, as will give it a prospective operation from and after the date of its passage.**

(1) That statutes will always be given a prospective operation unless a contrary intention is unmistakably expressed in the act is a general principle of the strictest application. Courts have always recognized the immense mischief resulting from giving to statutes a retroactive construction.

In Endlich on the Interpretation of Statutes, Edition 1888, Section 272, the rule is stated as follows:

> "Even where there is that in the statute which would seem upon other principle of interpretation to require a retroactive construction, the presumption against the same in the absence of an intention otherwise demonstrable to give the statute such an effect will overcome the influence of such rules."

In United States vs. Heth, 3 Cranch, 398, 413, the rule is stated as follows:

> "Words in a statute ought to have a retrospective application unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot be otherwise satisfied."

See, also, Chew Heong vs. The United States, 112 U. S., 536, page 559, where this rule is quoted with the additional statement "*that such is the settled doctrine of this Court.*"

In Auffm'ordt vs. Raisin (102 U. S., 620) Mr. Justice MILLER states the rules as follows:

* * * "The principle is too well established to "need the citation of authorities that no law will be

" construed to act retrospectively unless its language " imperatively requires such a construction."

For illustrations of the application of this rule, often against apparently express language in the statutes construed, see

People vs. Supervisors of Columbia Co., 43 N. Y., 130.
Matter of Richardson, 2 Story, 571.
Helmore vs. Shuter, 2 Shower, 17.
Dash vs. Van Kleeck, 7 Johns., 477, 503.
Peo. *ex rel.* Fosdick vs. Village of Perrysburg, 14 Ohio St., 472.
Burns vs. Carvalho, 1 Adolphus & Ellis, pp. 895, 896.
Auffm'ordt vs. Raisin, 102 U. S., 620.
Biggs vs. McBride, 17 Oregon, 640.
City of Oakland vs. Whipple, 44 Cal., 303.
Commonwealth vs. Pennsylvania Ins. Co., 13 Penn. St., 165.

In the matter of Richardson the Court refused to give a retroactive effect to an Act of Congress approved late on the night of March 3d, 1843, repealing a bankrupt act of 1841, even to the extent of cutting off a petition in bankruptcy filed on the morning of March 3d, 1843. Mr. Justice STORY concluded his opinion as follows:

> " * * * If it should be said that the law does not recognize any fractions of a day, why may we not deem the law in force only from the last instant of the day, instead of carrying it back, by relation, to first instant of the day? If there be any choice as to the principle of interpretation, one should think that that ought to be adopted, in cases of this sort, which is most favorable to private rights and public justice. Surely the Constitution is not to be set aside or varied in its intendment by mere legal fictions. On the contrary, it appears to me that, in all cases of public laws, the very time of the approval constitutes, and should constitute, the guide as to the time when the law is to have its effect, and then to have its effect prospectively, and not retrospectively."

In the City of Oakland vs. Whipple (44 Cal., 303), it was held that :

> " Where taxes are levied under a law which is repealed by a subsequent act, unless it be made apparent by clear and unequivocal language that the repealing act was intended to have a retrospective operation, it will be inferred that the intent of the Legislature was that the taxes should be collected in accordance with the law in force at the time they were levied."

(2) It is a general principle of equally strict application that in construing a statute the true intention of the Legislature is to be sought and given effect, and this principle, read with the other that statutes should be construed to operate prospectively, means that the Court will presume that it was the intention of the Legislature that the statute should operate prospectively from and after its passage, unless there is an imperative, unmistakable provision to the contrary.

How inadequate the language of the first section is as an expression "*imperatively requiring a retrospective construction*" has already been shown.

In arriving at the true intention of the Legislature, Section 1 cannot be read or construed as if it constituted the entire act. The intention of the lawmaker is to be deduced from a view of the whole statute and every material part of the same *(Kohlsaat vs. Murphy, 96 U. S., 153, 159–60)*. The Courts are permitted to go outside of the statute to consider the law as it stood before the statute, and the circumstances of its passing so far as shown by the records of the Legislature, and the journals of the two Houses may be examined to aid in determining what was the action of the Legislature *(Barry vs. Baltimore, &c., R. R. Co., 41 Md., 446 ; Gardner vs. Barney, 6 Wall., 511 ; United States vs. Ballin, 144 U. S., 1, 3)* ; and the entire subject of a statute and the policy of the law may be invoked to aid in the interpretation *(Blake vs. Nat. Bank, 23 Wall., 307–321)*.

Applying these general principles to the Tariff Act

of August 28, 1894, the intention of Congress to give the act a prospective operation from and after the date upon which it became a law very clearly appears.

(3) This intention appears from the history of the passage of the bill already considered. At every stage of its stormy career through both branches of Congress the intention to give it a prospective operation, even subsequent to the date at which it should become a law, is shown.

(4) The intention to give the act a prospective effect appears in the actual language used.

In Section 1 it is provided:

> "That on and after the first day of August, 1894, unless otherwise specially provided for in this act, there *shall be levied*."

And in Section 2 it is provided:

> "On and after the first day of August, 1894, unless otherwise provided for in this act, the following articles when imported *shall be exempt* from duty."

And in Section 38 it is provided:

> "That on and after the first day of August, 1894, there *shall be* levied, collected and paid by adhesive stamps at a tax of two cents for and upon every pack of playing cards," etc.

It is very evident that, when these words were inserted in the bill, they spoke from a time prior to August 1, and anticipated that the bill would become a law prior to that date. It is not a sufficient answer to this to say that "*shall*" is imperative as well as future; that it is used in these sections imperatively and is an apt word in that sense to express an intention to make the act retrospective. Read with the preceding words it is evidently speaking towards the future. It is true that in a complete expression of an intention to make

the act retrospective, should it fail to pass on or before the first of August, the Legislature might aptly have used the word "*shall*," but it would have been with a context, leaving no room for doubt that such was the intention.

(5) Comparison of the several sections of the act in which this date August 1 appears shows that a prospective operation was intended.

For example, Section 38 provides that on and after the first day of August, 1894, there "shall be levied, collected and paid by adhesive stamps a tax of two cents for and upon every pack of playing cards." Sections 43 and 45 impose a penalty of fifty dollars for every violation of this law incurred by selling such cards without affixing the adhesive stamp denoting the tax before mentioned. If the act is given a retroactive effect, every dealer in playing cards is not only liable for a tax of two cents a pack on every pack of playing cards manufactured and sold or removed from the place of manufacture, and upon every pack of playing cards in stock on and after August 1st, but he has also incurred a penalty of fifty dollars for every violation of this law, that is, for every pack of playing cards that he has sold or removed between August 1 and August 28. Of course, such a retroactive effect would be unconstitutional. The law would be to that extent *ex post facto*.

Section 23 illustrates further the evident intention to make this law prospective. In that section it is provided :

> "That from and after August 1st, 1894, no person shall transact business as a Custom House broker without a license granted in accordance with this provision."

Manifestly it is impracticable to make that section operate retrospectively. Between August 1 and August 28 there was no law which authorized the collector to require a license from a Custom House broker, and it is

evident that when the words "August 1st" were used in this section they spoke from an earlier date, and Congress clearly anticipated that the bill would become a law before that date.

The use of the date—"*the first day of August*"—in these sections shows that, when at a later date Congress passed the bill, its intention was that all these provisions (Secs. 1, 2, 23 and 38) should take effect on the passage of the act; that it meant by on and after the first day of August, &c., not earlier than that date, and on that date if the bill is then a law; if not, then as soon thereafter as it becomes a law. Otherwise, Congress must be assumed to have passed deliberately laws obviously *ex post facto* and laws obviously incapable of enforcement.

(6) The entire absence of express provisions in the act to meet the necessary results of giving it a retroactive construction, and the great hardships of such a construction, are strong indications that Congress intended the measure to operate prospectively only from and after the date upon which it became a law.

There are about fifty-two articles or classes of articles in the schedules of the Act of 1894, from "acetic acid" to "umbrella ribs," upon which a higher rate of duty is to be assessed than under the prior Act of October 1, 1890.

If such a retroactive construction as the appellees contend for is placed upon the act, consider the results. It must operate both ways. Not only must the Court hold that all duties collected between August 1 and August 28, under the tariff of October, 1890, must be refunded to the extent to which such rates of duty are higher than those provided in the Act of August 28, 1894, but also it must hold that on all entries of merchandise, either free under the tariff of October, 1890, but dutiable under the Act of August 28, 1894, or dutiable under the Act of 1890, at lower rates than under the Act of August 28, 1894, the duties of the latter act must now be assessed. Merchants, therefore, who, between August 1 and August 28, entered their merchan-

dise for consumption under the tariff of October, 1890, when no other Tariff Act was in existence, and who have made their contracts or sold their merchandise between August 1 and August 28 on the basis of the then existing law, must now by reason of this retroactive measure pay the Government all the difference and suffer a great and unexpected loss. Take, for example, entries of sugar between August 1 and August 28, finally liquidated, we will say, on or after August 28. This commodity under the tariff of October, 1890, was free, and was necessarily admitted to free entry, prior to August 28. But now, if this measure be given the peculiar retroactive effect contended for, every merchant who has made an entry of sugar, and who has sold his sugar or made contracts in respect to it on the assumption that it was free, must now pay to the Government a duty of forty per cent. *ad valorem*, or more. So with the very large number of articles which are dutiable at higher rates under the tariff of 1894 than they were under the Act of October, 1890. These necessary results of giving this measure a retroactive effect forcibly illustrate those immense mischiefs to prevent which courts always insist upon giving a law a prospective operation only from and after the date at which it becomes a law, unless an intent to the contrary is expressed in the act beyond a reasonable doubt. While it may be admitted for the purposes of argument that Congress has the power to pass a retroactive measure of the sort contended for by the appellees, the Court will require before holding that it has done so that the appellees shall show an expression of intention so certain and conclusive that it cannot be mistaken.

(7) Another suggestion in support of the proposition of the appellants that Congress never intended to give this measure a retrospective effect may be deduced from the fact that in the history of the United States no previous tariff act to operate retrospectively has ever been passed. To give the act such a construction is against the long-established policy of the law.

In statutes altering the duties on imported goods, as they affect business operations carried on at a distance and when time is necessary to enable importers and business men to act understandingly, it has been usually considered wise and expedient, and it has been the universal usage and course of legislation for Congress to fix some future day at which such statutes shall become operative. All the duty laws passed by Congress have operated prospectively (with exceptions as to bonded or warehoused goods in the custody of the customs officers at the time of the change in the law, and which are in some of the Tariff Acts made subject to the rates of duty in force at the time of their withdrawal) (2 Stat. at Large, 299; 3 Stat. at Large, 310; 9 Stat. at Large, 42; 11 Stat. at Large, 192; 12 Stat. at Large, 179, and later Tariff Acts).

## IV.

By Section 72 of the Act of August 28th, 1894, all acts done or rights accruing or liabilities incurred prior to the repeal of inconsistent laws remain unaffected by such repeal.

The language of Section 72 is that inconsistent laws are *hereby* repealed. Section 72 went into effect on August 28th (Bradbury vs. Robertson, 132 U. S., 491).

There was no retroactive repeal of the act of 1890. It was continued in full force and effect until the passage of the new act on August 28th.

If, now, it appears that the entry of their merchandise by the appellees was an act lawfully done prior to August 28th, 1894, or that the right of the Government to duties upon such merchandise under the provisions of the Act of October, 1890, was a right accruing or accrued prior to August 28th, 1894, or that the obligation of the appellees to pay duties on such merchandise under the then existing law, to wit, the Act of October, 1890, was a liability under that law, then it will neces-

sarily follow in the absence of any express provision to the contrary that the duties were properly assessed at sixty per cent. *ad valorem* under the Act of 1890, and should not be assessed for duty under the Act of 1894.

(1) The actual payment of the duties on August 8th, 1894, by the appellees, was an act done prior to the passage of the Act of 1894, on August 28th of that year, and prior to the repeal of the Act of 1890, under which the merchandise was classified.

The truth of this assertion appears conclusively from the mere statement of the facts of the case. The vessel arrived, the proof shows, on August 7, 1894, and the merchandise was entered for consumption on August 8, 1894. Duty was levied upon it by the Collector under the only tariff law then in existence, and it is conceded was correctly levied at sixty per cent. *ad valorem*. On that very day, August 8, 1894, the importers paid their duties, and received their merchandise on August 11, 1894, and all that was done on August 28th, 1894, was that on that date the liquidation was stamped upon the entry in these words liquidated as entered. There was no change in the original classification; no additional duty was demanded or collected. The payment of money made at the time of entering merchandise for consumption in a Custom House in the United States is a payment of the duties (Barney vs. Rickard, 157 U. S., 352).

In the present case the Collector had levied and collected the duties, and the importers had paid the same and obtained possession of their goods, and the goods had gone into consumption, all before Sec. 1 became a law.

But the appellees may contend that, while the Collector's action had been correct and lawful up to the time of the stamping of the liquidation upon the entry on August 28th, 1894, that then the Collector erred, and he should then have ascertained and determined their duties at a less rate under the new Act of August 28th, 1894, which went into effect on that day, and should have refunded to the appellees the difference

between the duties on their merchandise at 60 per cent. under the Act of 1890, and 50 per cent. under the Act of 1894, to wit, ten per cent. *ad valorem*.

But, it is submitted, if the duties had accrued and had been received by the United States, as in this case, and the goods delivered, while the former act (of 1890) was in force, the stamping of the liquidation on the entry on the date when the new act became a law (August 28th, 1894) would not of itself require that they should be liquidated at the rates under the new act (of 1894), *unless there was some special provision in the new act requiring that thing to be done.*

The original assessment of duty was concededly right, because it was made by the Collector in accordance with the law then in force (1890), and the final liquidation was right, because it followed the correct original assessment to its legitimate conclusion.

(2) The right of the Government to duties under the existing tariff law between August 1st and August 28th, 1894; that is to say, under the Act of October, 1890, on all merchandise entered for consumption or withdrawn from warehouse, was a right accruing prior to the passage of the Act of 1894; and the obligation of the importer between August 1st and August 28th, 1894, to pay the duties on such entries under the existing tariff law, to wit, the Act of October, 1890, was a liability under said law arising prior to the repeal of modification thereof by the passage of the Act of August 28th, 1894, and thereby continuing as if such repeal or modification had never been made.

It has been uniformly held for many years that the right of the United States to (then existing) duties *accrues* when the ship brings the dutiable goods into her port of entry (*U. S. vs. Vowell, 5 Cranch., 368; Arnold vs. U. S., 1 Gall., 340; 9 Cr., 119; Prince vs. U. S., 2 Gall., 207–8; 2 Opin. Atty.-Gen., 340*), and they *accrue* without entry (*U. S. vs. Dodge, Deady, 126; Perots vs. U. S., Pet. C. C., 257; U. S. vs. Lindsay, 1 Gall., 366*), and the duties *immediately* become a personal debt of the importer (*Meredith vs. U. S., 13 Pet.,*

*494; ~~U. S. vs. Lyman, 1 Gall., 366~~; U. S. vs. Phelps, 17 Blatch., 312, 315).*

Congress, therefore, made an express provision in this statute for all rights accruing or accrued, the broadest expression that could possibly be used to cover all such acts and rights as existed under the Act of October 1st, 1890, up to the time when the new act was passed and the prior act repealed.

We do not claim that the "saving *clause*," so-called can be construed to overcome and destroy express and clear provisions of the statute in which it is found, directly and expressly affecting rights already accrued at the time of its passage (*e. g.*, Sec. 10 of the Act of 1883, considered in Hartranft vs. Oliver, *infra*). But admitting that the language of the first section requires the Court to hold that Congress must have intended that section to relate back to August 1, 1894; it also clearly appears that Congress intended the Act of October, 1890, to remain in full force and effect until the passage of the new act on August 28th, and carefully saved from the effect of the repeal of the Act of 1890 all acts done, rights accrued and liabilities incurred under the earlier act prior to the repeal. This seems to be a conclusive direction that nothing already done under the Act of 1890 should be affected by the new act. And if Section 1 is given a retrospective effect, according to its terms, its operation must be confined to matters not already brought under the operation of the Act of 1890. In this way the intention of the Legislature may be carried out as expressed in both sections 1 and 72 without inconsistency or imputing to the Legislature an irrational purpose. Such a construction should be adopted. In Kohlsort vs. Murphy (96 U. S., 160), it is said:

> "Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment; but the controlling rule of decision in applying the statute in any particular case is that, whenever the intention of the Legislature can be discovered from the words employed, in view of the

> subject matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the Legislature, except when the language employed will admit of no other signification."

(3) The learned Circuit Court seems to admit that this saving clause, Section 72, would have the effect here contended for in respect to acts already done.

At folio , page , the opinion of the Circuit Court reads as follows:

> "The former law was in force when these goods were imported or withdrawn; this law might not affect anything already done under that; it might and would affect what was not done."

And folio 68:

> "These goods were imported or withdrawn on August 8th; the duties were liquidated on August 28th at the rates prescribed in the former act against the claim of the importers that the latter act should govern. This liquidation is the actual assessment of the duties."

It appears, therefore, that in the opinion of the Circuit Court if this stamp upon the entry, "Liquidated as entered," had been made on August 27th, the Act of 1894, although retrospective, would not have affected this case, because Section 72 would have operated upon everything that was done. That is to say, the Collector assessed duty correctly and collected it, and let the goods go into consumption, and this was right, because "*it was already done*" before the Act of 1894 became a law (on August 28, 1894) and while the Act of 1890 was still in force. But the theory and opinion of the learned Circuit Court is that here the efficacy of Section 72 ended. It saved only *acts already done* and not "*what was not done*" before August 28, 1894.

If that were so, what meaning is to be given to the words in the said "saving clause" (Sec. 72), that look

to ascertaining rights and ascertaining liabilities, which not only bind "assessed" but serve "assessing"? The earlier language of the "saving clause" (Sec. 72) not only reserves "anything already done" under the prior act (1913), but gives ample authority to every such note to check legitimate assessments under the prior act," as if the act of 1913 had not been repealed." In reality, nothing, as to the interpretation in suit, remained to be done to accomplish the transaction after the act of August 5th, 1916, became a law, except the mere formal act of the Collector in stamping the so-called "liquidation" on the entry. This was done on August 5th, 1916, the very day the new act was sent to the Department of State by the President, and then became a law without his approval, and before the law had been promulgated or the provisions officially known to the Collector. The "liquidation" on August 5th, 1916, did not increase nor decrease the amount of duties which had actually been paid by the importers on August 4th, in order to obtain possession of the goods, which were all delivered to the importers on August 5, 1916.

It will not do to say that there was no "payment of duties" until "final liquidation." Section 34 of the Customs Administrative Act of June 10, 1890, refers to the date of the liquidation "of duties" as a time from which to limit the right of the importer to protest, to wit, within ten days thereafter, and not as the time when payment is actually made. The "payment" of money as duties is one thing, and the final "liquidation" of duties is another. The moneys paid in by the importers on August 4th, 1916, were duties, and were paid as such then, and not when the final liquidation was made, on August 5th, 1916 (Entwistle vs. Stewart, 6 F. R. 6, 6 Ben. 6 Appendix, 1st Circuit, March 21, 1916; Downing vs. Buckner, 177 U. S., 332).

(4) The other theory of the learned Circuit Court, that this saving clause broke only the individual rights and does not govern the Government in any of the rights (Col. 76) is erroneous.

The learned Circuit Court seems to treat the term

of this "saving clause" (Sec. 72) by enumerating the doctrine that the "rights accruing or accrued" and the "rights and liabilities under said (prior) laws" referred to therein mean the "rights and liabilities" of the Imperator only, and not of the United States. The learned Court says: "Not that, but individual rights would seem to be intended to these saving clauses."

This is a new doctrine that a Draft Act only enumerates individual rights and does not affect the rights of the United States; that the United States are not bound by the language of the law, although the imperator is.

The right of the United States to declare wartime activity from the statute, in the absence of a statute, can hardly be legally impaired (The Liverpool Prize, 2 Gall., 184). It has always been settled a "right" by the Courts (U. S. vs. Ingraham, 1 Abbott, 484; Abbottlith vs. U. S., 14 Peters, 540), and the right of the United States to preserve this status has been settled a "right of sovereignty" (a case of murder, 1 Wash., 1811), and it is under such right of the United States to declare wartime (U. S. vs. Judge, Deady, 1861; U. S. vs. Powell, 5 Cranch, 1810, dic.) and that the United States are bound by the proclamations of the Executive (when the courts do not refuse jurisdiction (U. S. vs. Phelps, 11 Wheat., 1826; U. S. vs. Campbell, 11 Fed. Rep., 1882; Hunter vs. Bowen, 15 Fed. Rep., 1883).

Where are no words of construction in Section 72 to warrant any interpretation that only "individual rights" are considered. It does not read, "individual rights," or "rights of the Imperator," but it includes, without reserve, all "rights and liabilities" of all previous International, which includes the United States as well as refuses practice to previous transactions under the Draft Laws.

(b) In the opinion of the learned District Court, and in the arguments in that court, several cases were cited to show that the act could be given a retrospective effect in the sense contended for by the appellees. From an examination of these cases it will appear that

*they have no application to the question now before the Court. These cases are:*

*Bradbury vs. Robertson, 132 U. S., 491,*
*Hartranft vs. Oliver, 125 U. S., 525,*
*In re Gardiner, 38 Fed. Rep., 1013.*

## *The Bradbury Case.*

*It has been argued on behalf of the importers that Section 13 of the Tariff Act of March 3, 1883, was a "saving" section, and the duties provided by that act were not generally to take effect until July 1, 1883, yet the Supreme Court held in the case of Bradbury vs. Robertson, 132 U. S., 491, that Section 7 (of that act) repealing the duties on charges and coverings, went into immediate operation.*

**The language of Section 6 of the Act of March 3, 1883, was as follows:**

**SEC. 6. That** *on and after the first day of July,* **1883, the following sections shall constitute and be a substitute for title thirty-three of the Revised Statutes of the United States. The act was approved March 3, 1883. It was, therefore, like other tariff acts, a** *prospective* **and not a retrospective act. Where various sections of the act were postponed to go into effect on the 1st of July, it was so expressed. But Section 7 of the act (which was a separate and distinct section) did not postpone its operation until July 1. It read "that Sections 2907 and 2908 of the Revised Statutes of the United States, and Section 14 of the act entitled 'An Act to amend the customs revenue laws and to repeal moieties,' approved June 22, 1874, be, and the same** *are hereby repealed*, **and** *hereafter* **none of the charges imposed by said sections or any other provisions of existing law shall be estimated in** *ascertaining the value of goods* **to be imported," etc. Section 7 had to do with valuation and not with classification of imported goods. It contained within itself an immediate repealing clause in express terms, and provided for its** *immediate* **effect. The Treasury Department so construed it. The Courts so construed it. Sec. 13, therefore, had no**

application to it. It used the term "hereby repealed" and "hereafter," and was a complete and independent section as to valuation; and it did not contain the words "unless otherwise provided for in this act," as does Section 1 of the Act of 1894. But Section 7 was not retroactive. It did not go into effect prior to the date of its passage and approval; and the Supreme Court, in the case cited, coincided with the Treasury Department that it took effect "from and after the date" of its passage and approval. It was, therefore, a prospective section, and furnishes another illustration of the general rule that all duty laws are intended to be prospective in their operation.

HARTRANFT VS. OLIVER AND IN RE GARDINER.

The learned Court below, in its opinion in this case, refers to Section 72 of the Act of August 28, 1894, as the "saving clauses" of that act, and then refers to the so-called "saving clauses" of the Tariff Acts of March 3d, 1883, and October 1st, 1890, and says that each of the two latter Tariff Acts contained a "similar saving clause" to Section 72 of the Act of 1894.

The Court refers to the decision of *Hartranft vs. Oliver, 125 U. S., 525*, under the Act of 1883, and also to the decision of *In re Gardiner, 53 Fed. Rep., 1013; 4 C. C. A., 155*, under the Act of October 1, 1890, as being decisions construing the "saving clauses" of those two acts respectively, and as authorities to sustain its decision in this case.

The Court has evidently misapprehended the force and effect of the two decisions above quoted, neither of which construed the so-called "saving clauses" of the Acts of 1883 and 1890, but involved the construction of other clauses of those two acts, neither of which appear in the Act of August 28th, 1894.

The "saving clause" of the Act of March 3d, 1883, was Section 13 of that act. It reads as follows:

> "That the repeal of existing laws or modifications thereof embraced in this act shall not affect

any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause, before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made, nor shall said repeal or modifications in any manner affect the right to any office or change the term of tenure thereof."

The case of *Hartranft vs. Oliver, 125 U. S., 525*, did not construe Sec. 13 of the Act of March 3d, 1883, because there was no question in that case calling for its construction.

The facts in that case were that a vessel arrived at a port of the United States from a foreign port on the 30th of June, 1883, and was entered at the Custom House on that day. A Custom House Inspector took charge of it, and the vessel remained with unbroken hatches until after the following first of July. The Act of March 3d, 1883, contained a provision (Section 6), "that on and after the first day of July, eighteen hundred and eighty-three, the following sections shall constitute and be a substitute for title thirty-three of the Revised Statutes of the United States." But there was also a special provision in that act, contained in Section 10, "that all imported goods, wares and merchandise *which may be in the public stores* or bonded warehouses *on the day and year when this act shall go into effect*, except as otherwise provided in this act, shall be subjected to *no other duty* upon the entry thereof for consumption *than if the same were imported respectively after that day;* and all goods, wares and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, *shall be entitled to a refund* of the difference between the amount of duties paid and the amount of duties said goods, wares and merchandise would be subject to if the same were imported respectively after that date."

This was Section 10 of the Act of 1883, and was not Section 13, the saving clause. Here was a special pro-

vision in Section 10 that all goods, wares and merchandise in the public stores or bonded warehouses on the first day of July, 1883, should pay duties under the (then) new Act of 1883, and not under the old act.

*No such provision appears in the Act of August 28th, 1894.*

Now, the Supreme Court in Hartranft vs. Oliver, *supra*, simply held that the goods on board of the vessel in that case, being in the custody and under the control of officers of the customs, were in a public store or bonded warehouse within the meaning of those terms, as used in Sec. 10 of the Act of March 3d, 1883, and were therefore subject to the duty imposed by the provisions of that section, to wit, the duties under the new act (1883).

It will be noted that there was a special provision in Sec. 10 for just such a case, and also a provision therein *for the refund of the difference of the duties* between those imposed by the old act and those imposed by the new in such a case. The Court, therefore, was not called upon, in that case, to make or give any construction to Sec. 13 of the Act of 1883, which was the saving clause of that act, and which was not as broad in its provision as the saving clause (Sec. 72) of the act of August 28th, 1894.

It will be seen, therefore, that the decision in Hartranft vs. Oliver does not at all sustain the position taken by the learned Court below in this case. The acts are different in their provisions. The case refers to a special state of facts specially provided for by a special section (Sec. 10) in the act of March 3d, 1883, which is not to be found anywhere in the Tariff Act of August 28th, 1894.

The so-called "saving clause" of the act of October 1st, 1890, is contained in Sec. 55, and is similar to that of the Act of 1883.

In the case of Gardiner, cited in the opinion of the Court below (p. 25, fol. 73), there was no construction of this saving clause (Sec. 55) of the Act of October 1st, 1890.

In that case the vessel arrived in the port of New

York on Saturday, October 4, 1890, but the goods were not entered for consumption until October 6, 1890. The first section of the Act of October 1st, 1890, provided: "That on and after *the sixth day of October*, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed." The question in the case was whether the goods paid duty under the new act, which went into effect on October 6, 1890, as to duties, or under the prior act of March 3d, 1883.

There was in the Act of October 1st, 1890, a special section, which was Sec. 50, that provided: "That on and after the day when this act shall go into effect all goods, wares and merchandise *previously imported, for which no entry has been made*, and all goods, wares and merchandise previously entered without payment of duty, and under bond for warehousing, transportation or any other purpose for which no permit of delivery to the importer or his agent has been issued, *shall be subjected to no other duty* upon the entry or the withdrawal thereof than if the same were imported respectively *after that day.*

In other words, goods imported previous to October 6, but not entered until on or after October 6, should pay the duty prescribed by the new act of October 1st, 1890. This was a special provision for that special case. No such provision appears in the Act of August 28th, 1894. The United States Circuit Court of Appeals for the Second Circuit in the case of Gardiner above cited, simply decided that, under the special provisions of Section 50 of the Act of October 1st, 1890, the goods in that suit should pay the rate of duty imposed by the new act.

There was no construction, therefore, of the "saving clause" (Sec. 55) made in that case. The special provision in Section 50 took it out of the saving clause of Section 55 of that act. If there had been no Section 50 in the Act of October 1st, 1890, the goods would

undoubtedly have paid duty according to the rates prescribed under the old Act of March 3d, 1883.

It will be seen, therefore, that these two cases above cited, which were relied upon by the learned Court below in sustaining its decision in this case, really have no application to the facts in this case arising under a different statute.

There is nothing to be found in the Act of August 28th, 1894, which corresponds either with Section 10 of the Act of March 3d, 1883, or Section 50 of the Act of October 1st, 1890, upon which those two decisions were wholly based.

## IV.

The first question certified by the Circuit Court of Appeals should be answered in the affirmative; the second and third in the negative.

WALLACE MACFARLANE,
Attorney for the United States for the
Southern District of New York.

## Appendix A.

No. 2100. Burr & Hardwick vs. United States.

WHEELER, *J.:*

The Tariff Act of 1894 became a law on August 27th. It began with the provision, "That on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this Act, there shall be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed." These goods were imported or withdrawn on August 8th; the duties were liquidated on August 28th at the rates prescribed in the former Act, against the claim of the importers that the latter Act should govern. This liquidation is the actual assessment of the duties (Davies *vs.* Miller, 130 U. S., 284; Merritt *vs.* Cameron, 137 U. S., 542); and it should be made according to the law at the time. This latter Act was in force at that time, and whatever was done which it included should have been done according to its terms and effect. Its terms are plain, without room for construction or doubt, that on all goods imported or withdrawn when these were the duties should be assessed according to its own schedules. Each house, when it had the bill under consideration, fixed a then future date in this place; and from this an ingenious argument has been made to show that both Houses concurred in an intention that this date should be future whenever the Act should be passed. But the Senate, with legislative deliberation, inserted this date in proposals of amendment; the House with like deliberation, after the date had gone by, concurred in the proposals, and it so became a law. Thus the whole law-making power enacted that date as the date for that place in the law. What the effect of the law is as it stands is more open to doubt. The former law was in force when these goods were imported or withdrawn;

this law might not affect anything already done under that; it might and would affect what was not done. In Stockale *vs.* Insurance Co., 20 Wall., 323, Mr. Justice Miller, in delivering the opinion of the Court, said with reference to changing prior taxation: "Both in principle and authority it may be taken to be established that a legislative body may by statute declare the construction of previous statutes so as to bind the Courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the Courts in transactions which are past, provided no constitutional right of the party concerned is violated." And again: "Congress could have passed a law to re-impose this tax retrospectively, to revive the sections under consideration if they had expired, to re-enact the law by a simple reference to sections." No question exists, or is really made, but that this whole subject was within the law-making power; but that a law should not have any retroactive application unless that is plainly intended is more strenuously urged. No intention that duties after a certain prior date should be collected at certain rates could be more plainly expressed than by saying, as was said here, exactly that. This could not be so distinctly declared and something else be meant.

This Act of 1894 provides: "Sec. 72. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this Act shall not affect any act done, or any right accruing or accrued." This is said to save the right to the duties which had accrued to the Government under the existing laws on the importation or withdrawal of the goods; and if this saving includes the right of the Government to duties undoubtedly it would. The Tariff Act of 1883, upon the taking effect of which Hartranft *vs.* Oliver, 125 U. S., 525, arose, contained a like saving of rights accruing and accrued (22 Stat., 526, Sec. 13). The goods were imported and higher duties had accrued, as was said, before June 30, when that part of the Act

relating to those goods took effect; still the rate was held to have been changed by the new law, which could not have been properly done if the accrued duties had been within that saving clause. The Tariff Act of 1890, upon which *In re* Gardiner (53 Fed. Rep., 1013, 4 C. C. A., 155) arose, also contained a similar saving clause. The vessel had arrived and lower duties had accrued before October 6, when that part of the Act relating to those goods took effect, but the new rate was held applicable. The right of the Government to exact duties exists at all times, and was being exercised in the making of these laws, and not that, but individual rights would seem to be intended in these saving clauses.

Judgment reversed.

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## APPENDIX B.

### Opinion by Somerville, G. A.

The merchandise covered by the protests was, in each instance, imported and entered in bond for warehouse prior to August 1st, 1894, and was withdrawn for consumption subsequent to August 1st, 1894, and prior to August 28th, 1894 (and within three years from the date of original importation).

The goods were assessed for duty by the Collector under the several paragraphs stated in the Tariff Act of October 1st, 1890.

The importers claim that the present Tariff Act of August, 1894, went into operation *retrospectively* on August 1st, 1894, and that the goods are dutiable or free, as the case may be, under the provisions of the latter law.

The question raised, then, is this: was it the intention of Congress that the new Tariff Act of August,

1894, should govern, so as to levy duties on merchandise imported and entered in bond for warehouse prior to August 1st, and withdrawn for consumption between August 1st and August 28th, 1894?

To sustain the protests the law must be construed to take effect *retroactively* on August 1st, 1894, or twenty-seven days before it actually became a law according to the forms of the Constitution.

This contention of the importers is based on Section 1 of the Tariff Act of 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes."

The present Tariff Act originated in the U. S. House of Representatives, was passed as House Bill No. 4864 on February 1st, 1894, and, after amendment by the Senate, was passed by that body on July 2d, 1894, and, after being concurred in by the House, went into the hands of the President on August 15th. It was never approved by the President, but became a law on August 28th, 1894, by virtue of Section 7 of Article I. of the U. S. Constitution, which provides that "if any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, *the same shall be a law* in like manner as if he had signed it, unless the Congress by their adjournment prevents its return, in which case it shall not be a law."

It may be assumed that the Tariff Act of 1894 became operative as a law at the hour of midnight on the 27th of August, 1894, or, what is the same thing, at the first moment of the 28th day of said month, just as if the President had approved or signed it on that day (Burgess *v.* Salmon, 97 U. S., 381; Lapeyre *v.* U. S., 17 Wall., 191; Endlich *v.* Inter. Stst., Section 498).

Section 1—the enacting clause of this law—reads as follows:

"Be it enacted, &c.—That on and after the *first day of August*, 1894, *unless otherwise specially provided for in this Act*, there *shall be* levied, collected and paid upon all articles imported from foreign countries, or

withdrawn from consumption, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely." (Here follow the various schedules with rates of duty attached.)

Section 2, embracing the "Free List," reads as follows:

"On and after the *first day of August*, 1894, *unless otherwise provided for in this Act*, the following articles, when imported, shall be exempt from duty." (Here follows the schedule of exempt articles.)

It may be admitted that Congress possesses the Constitutional power to make revenue laws retrospective so as to impose additional duties on goods previously imported, or to remit or to release such duties altogether, whatever may be said as to the justice or injustice of such legislation. Such a law would divest no vested rights of importers, nor impair the obligation of any contracts between them and the Government, nor be subject to any other Constitutional objection, so far as we can see (Westfall *v.* Shook, 5 Blatch., 383).

If the Act in question, however, became operative by retroaction on August 1st, 1894, to *reduce or remit* duties imposed by the Tariff Law then in force, it would be equally operative to *impose* duties on goods which (like raw sugar) were made free in the prior law and dutiable under the new law, or in cases where the new law *increases* the rates of duty imposed by the one repealed, as precious stones and certain alcoholic compounds.

While none of these protests fall within the latter category, it is proper to consider the retrospective application of the law to the cases where duties are *increased* as well as to those where such duties are *reduced* or *remitted*, because light is thereby thrown on the question of legislative intention.

It is perfectly manifest to customs experts, who are familiar with the procedure of assessing duties, that it is absolutely impracticable to apply the law to many cases where the assessments have been completed by

liquidations, the duties paid and the merchandise gone into consumption. It could scarcely have been intended by Congress that such completed transactions should be revoked or abrogated, and new liquidations attempted by the Collector. This, as we have said, would in very many cases be impracticable, if not impossible, and any efforts to do so would lead to inextricable confusion, to say nothing of its manifest injustice.

We are, moreover, confronted by the general rule, that a retrospective operation should never be given to a Statute when not required by express command, or by necessary implication (Murray *v.* Gibson, 15 How., 421; Chew Heong *v.* U. S., 112 U. S., 536).

The language of the Act, to be so construed, must admit of no reasonable doubt, but preclude all question as to such intention (Endlich *v.* Inter Stat., Sec. 271, and authorities cited in note).

The merchandise under consideration, as we have seen, was withdrawn from bonded warehouse for consumption after August 1st, and prior to August 28th, 1894; that is to say, before the present law was enacted by Congress in such form as to acquire any operative force or effect.

The law then in force as to such withdrawals was embodied in Section 54 of the Tariff Act of October 1st, 1890, which amended Section 20 of the Customs Administrative Act, so as to read as follows: "That any merchandise deposited in bond in any public or private bonded warehouse *may be withdrawn for consumption* within three years from the date of the original importation *on payment of the duties and charges to which it may be subject by law at the time of such withdrawal.*"

An analogous principle of Tariff taxation was embodied in different words in Section 10 of the Tariff Act of March 3rd, 1883 (22 Stat., 525, c. 12), the "manifest justice" of which was recognized by the Supreme Court in *Hartranft* v. *Oliver*, 125 U. S., 525, by extending it to a case admitted not to fall strictly within the letter of the Statute. The law was, in other

words liberally construed to advance justice by making the goods in question dutiable under the law in existence at the time they went into the possession of the owner for consumption. No just rule is perceived why a like rule of construction should not be adopted in the present case.

The Tariff Law in force at the time the present goods were withdrawn was the Act of October 1st, 1890. The merchandise was then subject to the rates of duty imposed by that law. The duties clearly attached at the time of withdrawal under that law. The liability of the importers for the duties was clear, and the right of the Government to collect such duties was unquestionable, unless these rights and liabilities have been abrogated by the present law (Fabri *v.* Murphy, 95 U. S., 191).

This brings us to consider the effect of Section 72 of the present Tariff Act, numbered Section 105, of the Senate Bill (which was concurred in by the House), and which is the same in substance as Section 55, of the Tariff Act of 1890.

"Section 72. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this Act *shall not affect any act done*, or *any right* accruing or *accrued*, or any suit or proceeding had or commenced in any civil cause before the said repeal or modification, *but all rights and liabilities* under said laws *shall continue and may be enforced in the same manner as if said repeal or modification had not been made.* All offences committed and all penalties or forfeitures or *liabilities incurred* prior to the passage of this Act, under any statute embraced in or changed, modified or repealed by this Act, may be prosecuted or punished in the same manner and with the same effect as if this Act had not been passed." * * *

The policy of this section is in harmony with that of Section 13 of the U. S. Revised Statutes, which has been construed to prevent the release, by repeal of any statute, of any penalty, forfeiture or civil liabilities already incurred, whether in criminal or civil cases

(United States *v.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178; U. S. *v.* Reisinger, 128 U. S., 398).

It is a special legislative provision, designed to keep in force every right and liability of the Government, or of any person, which has accrued or been incurred under any law which may be amended or appealed by Congress. It applies as well to duties which may accrue under revenue laws as to any other right or liability, and must be construed to operate as an exception or proviso to the enacting clause of the Tariff Law, which does not apply retroactively to cases "specially provided for" in the said law, as cases of withdrawal from bonded warehouses seem to be.

The more reasonable mode of harmonizing sections one and seventy-two seems to us to be by confining the operation of the phrase "articles imported from foreign countries or withdrawn for consumption," occurring in Section 1, to such articles as may be imported or withdrawn from bonded warehouse on or after August 28th, 1894, when the law went into actual operation under the provisions of the Constitution. The language of the section is, "there *shall be* levied, collected," &c., and the same language of futurity occurs in Section 7 of Article 1 of the Constitution above quoted, "the same *shall become a law* in like manner as if he (the President) had signed it," &c.

This construction would, in fact, seem to be necessary in order to render the law, in some of its parts, free from constitutional objections. Section 38, for example, provides "that on and after the *1st day of August*, 1894, there *shall be* levied, collected, and paid by adhesive stamps, a tax of two cents for and upon every pack of playing cards," &c.

Sections 43 and 45 impose a "penalty of $50" for every violation of this law incurred by selling such cards without affixing the adhesive stamp denoting the tax before mentioned.

To make the part of the law operative by a retroaction on August 1st, 1894, would clearly render it repugnant to Section 9 of the U. S. Constitution, which prohibits Congress from passing *ex post facto* laws (*Ex*

*parte* Garland, 4 Wall., 333, Cummings case, *Ib.*, 277). To give the law a *prospective* operation—that is, to make it effective as a law only from August 28th, 1894—removes the objection, and harmonizes the section in question with the fundamental law which equally binds Congress aad the Courts.

So with Section 23, which provides that "from and after *August* 1, 1894, no person shall transact business as a Custom House Broker without a licence granted in accordance with this provision," &c. This section would be of impossible application retrospectively, because there was no authority of law to require such license between August 1 and August 28, 1894, or until the whole Tariff Act of 1894 became a law by the enactment of Congress and the failure of the President to sign or veto or return the bill, as the case might be.

An authority strongly corroborative of this construction is found in the case of Burn *v.* Carvalho, 4 Neville and Manning, 394. The ancient rule in England was that an Act of Parliament always took effect by relation from the first day of the session, if no other day was expressly fixed for the beginning of its operation. To abolish this fiction, which was both absurd and unjust, the Stat. of 33 Geo. 3, c. 13, was enacted, and to this end provided that the clerk of Parliament should endorse on every Act, immediately after its title, the date of its passing as well as the date of its receiving the Royal assent. This endorsement is a part of the Act, and is generally construed to be the date of its commencement when no other time is fixed. It was nevertheless held, in the above cited case, that a certain Act of Parliament should be construed to take effect only from the time of receiving the Royal assent, although it was expressly declared it should commence on a prior date named in the Act. The language of the Act was *prospective* in the same sense as that of the present Tariff Law is, and the date of Royal assent given at a day subsequent, was held to dominate the day named for the law to go into effect. This English case is cited with approval in Endlich on the Interpretation of Statutes, Section 498, where this language is used:

"But where a particular day is named for its commencement, but the Royal assent is not given until a later day, the Act would come into operation only on the later day."

We accordingly hold, as to the merchandise covered by the protest under consideration, that the Tariff Act of August, 1894, did not go into legal operation at an earlier date than August 28th, 1894. There are certain paragraphs, as Paragraph 297, relating to manufactures of wool, and Paragraph 321 covering certain toys, the operation of which is postponed to a still later date. But these provisions have no bearing on the question now before us for decision.

The protests are all overruled, and the Collector's decision is affirmed in each case.

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## APPENDIX C.

### Opinion of Solicitor of the Treasury.

DEPARTMENT OF JUSTICE,
Office of the Solicitor of the Treasury,
WASHINGTON, D. C., Sept. 19, 1894.

Hon. J. G. CARLISLE,
Secretary of the Treasury:

SIR—I am in receipt of a communication from Acting Secretary Curtis, enclosing a letter (herewith returned) received from Hon. H. M. Somerville, Chairman of Board No. 2, General Appraisers, New York, in which he states that he has now under consideration a number of protests involving the question as to the time when the new Tariff Law went into effect, whether on the 1st of August, as stated in the Tariff Law, or on the 28th of August, when the Act became a law.

The Acting Secretary desires to be advised in regard to the proper legal construction of § 1 of said Act.

The law looks upon retrospective or retroactive legislation with emphasized disfavor. So much so, in

fact, that the Constitution of the United States expressly prohibits the passage of retroactive laws, that are *ex post facto*, or that impair the obligations of contracts. One of the standard writers of English Law (Lord BACON) says: "It is in general true that no statute is to have a retrospect beyond the time of its commencement." From text writers the maxim has been incorporated in various codes of laws.

The French Code contains a positive provision that laws are made only for future cases, and can have no retrospective effect. Several State Constitutions prohibit the enactment of retroactive laws *(Sedgwick on Stat., p.* 160 *et seq.)*.

In *Dash* vs. *Van Kleek*, 7 *Johnson Reports*, 477, Judge Thompson said:

> "In may in general be truly observed of retro-
> "spective laws of every description, that they
> "neither accord with sound legislation nor the
> "fundamental principles of the social compact.
> "How unjust, then, the imputation against the
> "Legislature that they intend a law to be of that
> "description, unless the most clear and un-
> "equivocal expressions are adopted."

Judge Kent, who also heard that case, said:

> "I think it can be shown that the Act cannot
> "be adjudged to operate either as a new rule for
> "the government of a past case, or as interpreting
> "a former statute for the direction of the courts;
> "and I should be unwilling to consider any Act
> "so intended, unless that intention was made
> "manifest by express words; because it would be
> "a violation of fundamental principles, which is
> "never to be presumed."

Sutherland on Stat. says (§ 406) with reference to retroactive laws:

> "Such statutes, when not forbidden by the
> "Constitution, may be valid, but there is always

" a strong leaning against giving them a retrospect-
" ive operation, and this proceeds from the pre-
" sumption that the Legislature does not intend
" what is unjust. ' Those whose duty it is,' says
" ERLE, *C. J.*, ' to administer the law, very prop-
" erly guard against giving to an Act of Parlia-
" ment a retrospective operation, unless the inten-
" tion of the Legislature that it should be so
" construed is expressed in clear, plain and unam-
" biguous language.' "

Endlich on the Interpretation of Statutes (271 *et seq.*) says :

" Upon the presumption that the Legislature
" does not intend what is unjust, rests the lean-
" ing against giving certain statutes a retrospec-
" tive operation. * * They are construed as
" operating only on cases or facts which come into
" existence after the statutes were passed, unless
" a retrospective effect be clearly intended.

" Indeed," he continues, " the rule to be de-
" rived from the comparison of a vast number of
" judicial utterances upon this subject seems to
" be, that even in the absence of Constitutional
" obstacles to retroaction, a construction giving to
" a statute a prospective operation is always to be
" preferred, unless a purpose to give it a retro-
" spective force is expressed by clear and positive
" command, or to be inferred by necessary, un-
" equivocal and unavoidable implication from the
" words of the statute taken by themselves and in
" connection with the subject matter, and the oc-
" casion of the enactment, admitting of no rea-
" sonable doubt, but precluding all questions as to
" such intention."

*See, also, Dwar. Stat., p.* 162–6, *and notes.*

In *Prince* vs. *U. S.*, 2 *Gall.*, 204; *U. S.* vs. *Heth*, 3 *Cranch*, 399, and *Harvey* vs. *Taylor*, 2 *Wall.*, 328, it was held that statutes are to be construed to operate

prospectively, unless a retrospective effect be clearly intended. (See, also, *McEwan*, vs. *Bulkley*, 24 *How.*, 242.) In order that a statute may be construed to have a retrospective operation, the language should be so clear, strong and imperative that the intention of the Legislature cannot otherwise be satisfied *(Chew Hoeng* vs. *U. S.*, 112 *U. S.*, 536*)*.

An Act releasing a portion of the duties on prize goods captured by private armed vessels, was held not to apply to captures previous to its passage, though the condemnation took place subsequently *(Price* vs. *U. S.*, 2 *Gall.*, 204; *Dwar. Stat., p.* 162, *and notes)*.

A retrospective law which does not impair the obligations of a contract, nor partake of the character of an *ex post facto* law, is not, however, prohibited by the Constitution *(Satterlee* vs. *Matthewson*, 2 *Pet.*, 380; 11 *Pet.*, 420*)*.

The Tariff Act of August 28, 1894, is neither *ex post facto* nor a law that impairs the obligations of a contract, even if it should be held as operating from the 1st of that month.

But I am not of the opinion it was the intention of Congress that said Act should go into effect on the 1st of August. If such had been the intention of the Legislature, it is not improbable that some specific direction would have been given for the refund of the excess of duties collected between that date and the time when the Act became a law. True, this intention might be implied, and must, if it be held that the statute operates from the 1st of August, but it is significant that the Act is absolutely silent as to the refunding of duties —duties aggregating millions of dollars—and also the collection of duties, on sugars, for instance, amounting to a large sum of money. Besides, the language of the Act clearly intends that it was to operate prospectively, and not retrospectively.

The words are: " * * There *shall be* levied, collected and paid." * * * * And § 2 provides that "The following articles *when imported*, shall be exempt from duty," &c. * *

Moreover, it is significant of the Legislative intention

that the first section of the bill as it passed the House Feb. 1, 1894, provided that "On and after the 1st day of June, 1894, there shall be levied, etc.," thus looking forward for a period of four months before said section should operate. It is no less significant and instructive than when the bill was reported to the Senate the 30th of June was substituted for the 1st of June; and when the bill finally passed the Senate on the 3d of July, the first section was amended to operate from the 1st of August instead of the 30th of June. Thus every step taken in the passage of this bill in the House and in the Senate shows that the bill was expected and intended to have a prospective, and not a retroactive, operation.

While the question is not free from doubt, yet I am of the opinion that said Act did not go into operation on the 1st of August, but on the 28th of August, when it became a law.

Very respectfully,

F. A. REEVE,

Solicitor.

# Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES

vs.

JAMES M. BURR, CHARLES C. HARDWICK.

## The Question to be Decided.

Section 1 of the Tariff Act of August, 1894, provides: "That *on and after the first day of August, eighteen hundred and ninety-four*, unless otherwise specially provided for in this Act, there shall be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:

And paragraph 276, "Schedule J" of said section and act imposes a duty of 50 per cent. on cotton laces. The appellees imported cotton laces on August 8th, 1894, and the Collector assessed upon them a duty of 60 per cent. *ad valorem*. Appellees having complied with all requirements of law as to protest and suit claim to recover the 10 per cent. in excess. The Board of General Appraisers overruled the claim of the appellees,

and *read the words "on and after August 1st, 1894," out of the statute in order to give effect to an assumed legislative intent.* Judge WHEELER reversed their decision. Unless the words "on and after August 1st, 1894," are to be read out of the statute there is no defense to the claim of the appellees.

## POINTS.

### I.

**The language of Section I. being free from all obscurity and ambiguity, there is nothing to interpret and no room for construction, and none of the rules of construction invoked by appellant and discussed elaborately and with the citation of numerous authorities, have any application to the case.**

The law on this subject, as gathered from the numerous authorities, both in this country and in England, is thus stated by Endlich in his work on the construction and interpretation of statutes (Section 4):

> "When, indeed, the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise (and 'those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded'). It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absoluta sententia expositori non eget.* Such language best declares, without more, the intention of the law giver, and is decisive of it. *The legislature must be intended to mean what it has plainly ex-*

*pressed, and consequently there is no room for construction.* (It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language to give effect to what they suppose to have been the real intention of the law makers. Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be. 'It has, therefore, been distinctly stated, from early times down to the present day, that judges are not to mold the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship, or of what in their view is right and reasonable or is prejudicial to society; *are not to alter clear words, though the Legislature may not have contemplated the consequences of using them;* are not to tamper with words for the purpose of giving them a construction which is 'supposed to be more consonant with justice than their ordinary meaning.') *Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous.* If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or exceeding cases merely because no good reason appears why they should be excluded or embraced. *However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect.* (Indeed, it is said that it is only when all other means of ascertaining the legislative intent fail that courts may look to the effects of a law in order to influence their construction of it. But, whilst it may be conceded that, where its provisions are ambiguous and the legislative intent is doubtful, the effect of several possible constructions may be looked at, in order to determine the choice, it is very certain, that, *when once the intention is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to*

*make the law reasonable, but to expound it as it stands, according to the real sense of the words.*"

And these views are fully supported by the following authorities:

Sturges vs. Crowninshield, 4 Wheat., 202.
Thornley vs. United States, 113 U. S., 310.
U. S. vs. Warner, 4 McLean.
Hyatt vs. Taylor, 42 N. Y., 258.
Douglass vs. Chosen Freeholders, 38 N. J., L., 214.
Bradbury vs. Wagenhorst, 54 Pa. St., 182.
Allen vs. U. S., 52 Fed. Rep., 585.

The language of Section 1 is as plain, clear, direct and free from all ambiguity as it would be possible to select. It requires and admits of no interpretation or construction, *and, indeed, it is not interpretation or construction which the Government suggests for it—it is* ELIMINATION OR OBLITERATION.

Had this act become a law at any time prior to August 1st, 1894, no one would ever have dreamed of suggesting that there was anything in the words "on and after August 1st, 1894," which required interpretation or construction. So that the contention of the Government is, in effect, that the date of the passage of a law may be referred to not to *explain* am ambiguity, but to *create* one.

If, then, Section 1 of the act is plain and unequivocal in its terms, there is no necessity for, and therefore no excuse for, seeking to "construe" it by reference to other sections of the act, or to the history of its passage through Congress, or to the results which would ensue from adherence to its plain terms, although, as we shall hereafter show, even if these were all resorted to they would show nothing inconsistent with the enforcement of Section 1 according to its letter.

## II.

**If resort could properly be had to principles of construction, the contention of the appellant violates one of the most fundamental of such principles, viz., that effect is to be given to every part of a statute.**

In Endlich's Statutes, Section 23, the well-known rule is thus stated :

> " A construction which would leave without effect any part of the language would be rejected, unless justified on similar grounds. And the fact that a given construction would make a word redundant is some reason for its rejection ; for, it being presumed, wherever such a presumption can be sustained, that the legislature meant precisely what it said, no word in it is to be treated as unmeaning, if a construction can be legitimately found which will preserve it and make it effectual ; *and the same rule forbids the rejection as a meaningless or superfluous of any sentence or clause of a statute.*"

And although citations are unnecessary, the following authorities are in point :

Montclair vs. Ramsdale, 107 U. S., 147.
Dearborn vs. Brooklyne, 97 Mass., 466.
Rawson vs. State, 19 Conn., 292.
Hartford Bridge Co. vs. Union Ferry, 29 Conn., 210.
Ogden vs. Strong, 2 Paine, 584.
Davis Case, 3 Ben., 482.
Parkinson vs. State, 14 Md., 184.

Now, the brief of the appellant, and the opinion of Judge Somerville, in rendering the decision of the Board of General Appraisers (Rec., fols. 31-35), will be

searched in vain for any suggestion as to any meaning or effect which is to be given to the words "on and after the first day of August, 1894" in Sections 1 and 2 of the act. As we have before suggested, they do not attempt to explain them or apply them, but simply to *strike them out*. Appealing to their contention this act is to be interpreted precisely as if these words were not there. But they were put there by express amendment in the Senate, the House of Representatives concurred in the amendment, and the President did not dissent from them, and *there they are* (see History of Legislation in Certificate).

Has this Court the right or the power to read them out of the statute?

## III.

## Examination of the various sections of the act show a careful discrimination by Congress in its use of language to prescribe when various parts of the act should take effect.

Section 1 says, "on and after the first day of August, 1894."

Section 27 says, "from and after the first day of January, 1895."

Section 48 says, "*on and after the passage of this act.*"

*The appellant asks this Court to hold that the language of Section 1 has precisely the same meaning as the language of Section 48.* For aught we can see the Court has as much right to do this as it would to hold that the language of Section 27 had the same meaning as the language of Section 48.

## IV.

**The fact that giving effect to the plain and unequivocal language of Section 1 would result in making the statute retrospective in its operation, furnishes no justification for reading the words "on and after August 1st," out of the statute.**

The reports, both Federal and State, abound with cases on the question of retrospective legislation. But they all lay down one principle, and vary but slightly in the form of its expression. The first case cited by appellant (U. S. vs. Heth, 3 Cranch, 398, 413) will do as well as any other for purposes of illustration. It says:

> "Words in a statute ought not to have a retrospective application unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot be otherwise satisfied."

Are not the words "on and after the first day of August, 1894," clear, strong and imperative? Can anybody suggest how they could be made more so? Can the appellant find or cite a single case where any Court has held that a statute which provided in express terms that it should take effect on a fixed date, *giving the year, month and day of the month*, which date was prior to the date of the enactment, should not have a retrospective operation unless it was open to constitutional objection, as *ex post facto*, or as violating an express provision of the Constitution (such as exists in many of the States) prohibiting retrospective legislation? No such case is to be found in appellant's brief, and after an exhaustive examination of the

authorities we feel abundantly justified in asserting with confidence that none such can be found.

The true rule is thus stated by Endlich, Section 283:

> "It is hardly necessary to add that (constitutional objections being out of the way), whenever the intention is clear that the act should have a retrospective operation, it must unquestionably be so construed, however unjust and hard the consequences may appear."

It is conceded that Congress had power to make Sections 1 and 2 retrospective, and they are clearly not *ex post facto*, as they do not relate to crime.

The right of Congress to enact retrospective legislation being undisputed, and the language in which they have done it being clear, plain, unequivocal and susceptible of no other interpretation, and the Courts having always conceded that a retrospective effect must be given to the statute if the language imperatively requires it, it would seem that the numerous authorities bearing on the wisdom, justice, or propriety of it, which are so elaborately discussed by counsel for the appellant, are of only academic interest, and might more profitably be laid before Congress than before this Court.

Section 7 of the Act of March 7, 1864, entitled "An Act to increase the internal revenue and for other purposes," 13 U. S. Stat. at Large, page 16, provided:

> "That, from and after the passage of this Act, in addition to the duties heretofore imposed by law, there shall be levied, collected and paid on spirits distilled from grain or other materials, whether of American or foreign production, imported from foreign countries previous to the first day of July next, of first proof, a duty of forty cents on each and every gallon, and no lower rate of duty shall be levied or collected than upon the basis of first proof, and shall be increased in proportion for any greater strength than the strength of first proof; *and that upon all such spirits imported prior to the passage of this act* there shall be levied, col-

lected and paid an *additional* tax of forty cents per gallon, to be collected under the direction and according to regulations established by the Secretary of the Treasury."

And this retrospective tax on articles already imported was held to be constitutional in Westfall vs. Shook, 5 Blatchf., 383.

## V.

**The fact that the plain language of Section I may possibly operate in some instances to increase taxes retrospectively should have no weight to induce the Court to substitute another and a later date for its taking effect than that selected by Congress.**

Deep and tender solicitude is exhibited by the counsel for the Government for the poor importers who may find that goods which they imported and sold at a lower duty are, by the decision of the Court, made subject to a higher. We think he is distressing himself unnecessarily. His diligence seems to have discovered (if we may judge from his brief in the Court of Appeals) "fifty-two classes of articles from acetic to umbrella ribs" on which duties are raised by the Act of 1894. We do not know what the fifty-two are, and he does not tells us. If the two articles named are included in his list, we may remark that the duty on acetic acid is changed from one and a half cents a pound and four cents a pound (according to specific gravity) to twenty per cent. *ad valorem*, and on umbrella ribs from thirty-

[illegible] [illegible] [illegible] [

objection, and it is not contended by the appellees that anything in Section 1 of the Act of August, 1894, dispensed with the necessity of such a protest as a condition precedent to any review of the Collector's action.

Section 27 of this act provides:

> "That from and after the first day of January, eighteen hundred and ninety-five, and until the first day of January, nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether such gains, profits or income be derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected and paid annually upon the gains, profits and income from all property owned and of every business, trade or profession carried on in the United States by persons residing without the United States. And the tax herein provided for shall be assessed by the Commissioner of Internal Revenue, and collected and paid, upon the gains, profits and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax."

Under this section of the law the Treasury Department is requiring a return and proposes to levy a tax on every income exceeding $4,000 for the year ending December 31st, 1894. As to the income received, and in many instances doubtless spent, before August 28th, 1894 (almost two-thirds of the year), this is retrospective taxation pure and simple, and there is not even the excuse for it that the language of the act peremptorily and explicitly requires it.

[redacted]

[redacted]

Attention is called to the following facts as stated in the record (Abs. 62, 63):

> "That said bill, as amended by the Senate, passed the Senate on July 2, 1894.
>
> "That when it passed the Senate the date contained in the first and second sections thereof was August 1, 1894, instead of the 28th of June, 1894.
>
> "That the bill, as amended in the Senate, finally passed the House August 13, 1894, *after a long discussion and deliberation by the Committee of Conference.*
>
> "That on August 15, 1894, having received the signatures of the presiding officers of both Houses, the bill was sent to the President of the United States."

It thus appears that the date August 1st was deliberately inserted in the bill by amendment in the Senate; that, as so amended, it was in the possession of the House forty-three days, and that the House, "*after a long discussion and deliberation by the Committee of Conference,*" accepted the amendment, and that when it did so it was fourteen days after the date fixed for Sections 1 and 2 to take effect.

The inquiry is natural, Why didn't the House, if it wanted the act to take effect in the future, amend the bill to that effect? Why did it leave August 1st in the bill if it did not want the act to take effect August 1st? The reasons may be, as has been suggested,

"differently well understood," but we shall take the liberty of calling attention to them.

For this purpose we shall refer to the debates in Congress. It is well settled that these cannot be referred to for the purpose of altering the plain language of the law, but they may very properly be consulted to for construing it.

On the 28th of August, 1894, the very day after the House passed this bill, Senator Vest of Missouri, a member of the Finance Committee and of the Committee of Conference, and of the three Senators who had been in charge of the bill from the beginning in the Senate, made the following statement with reference to the bill:

> "The House conferees insisted upon these reductions and from the beginning to the end of the whole conference the trouble was, and I say it most respectfully and kindly, that our friends in the other House could never be made to understand that we knew more about the condition of affairs in the Senate than they did. Their ideas seemed to be that for some sinister or occult purpose we were avoiding an open vote. They continually demanded of us, 'Take the bill back to the Senate with such amendments as you conferees consider ought to be made, and let the Senate, in the broad, open light of day, vote upon it.'
>
> "We, upon the other hand, with one view under heaven, so far as I am concerned, that of avoiding the absolute destruction of all tariff legislation during this Congress, assured them, and every day confirmed us in our opinion, that *if the bill came back here with material amendments it would be defeated*, and the country would be told that the Democratic party was incompetent to make any bill at all." (Cong. Rec., Fifty-third Congress, Second Session, Vol. 26, p. 10,017).

On the following day, August 17th, Mr. McMillin of Tennessee, a member of the House Committee on Ways and Means and of the Conference Committee, in

proposing a bill to correct an alleged "incongruity" in this act as to alcohol used in the arts, made the following statement:

> "So far as I know, there was no member of the conference committee who was not willing and did not desire—indeed, who was not anxious—that this correction should be made. There was no concealment from the House at any time as to the existence of this incongruity. And it may be further said that the bill was passed with a knowledge of its existence. But, as we all know—a thing not necessary to be concealed, a thing I could not conceal if I wished, and would not if I could—it finally came to a point where *we had to pass the tariff bill with the Senate amendments, this one included, or get no bill at all.*"
>
> (*Id*, p. 10,971).

On August 13th, 1894, two days before the bill passed, Representative Hunter, of Illinois, in a speech urging the passage of the bill which is now the tariff law, said:

> "*We have reached a time and condition that compels us to accept and pass the Senate bill without amendment or change of a single word or continue in force the McKinley Law.* The alternative now is the Senate bill or the McKinley bill. It is a well-known fact to all of us that if the Senate could recall their own bill and take action upon it, it would be defeated. In this contingency no Democrat should hesitate for a moment."
>
> *Id.*, p. 10,309.

These men were all stating what, as has been suggested, is "sufficiently well understood." And now what the House of Representatives could not do, what the Committee of Conference failed to do, *this Court is asked to do, viz., to amend this bill.* For to take "On and after August 1st, 1894," out of the bill is not to interpret it, or construe it, but to *amend it.* It is asked to act as a third House and amend this bill,

and that forsooth when neither of the other Houses can be consulted as to whether they agree to the amendment. *If this is not summoning this Court to assume the functions of legislation, pray what is it?*

The history of this legislation shows that *the minds of the parties met as to the date August 1st, and they never met as to any other date.* The Court will have to make a new statute for them or affirm the judgment in this case.

In the brief used by counsel for the Government in the Court of Appeals occurred the following:

> "If it can be said that the House, by retaining the bill until after the prospective date stated in it when it came from the Senate had passed, has shown an intention to give the bill a retroactive effect in respect to the provisions of those sections in which the date August 1 is found, it is evident that the Senate has never concurred in such an intention.
>
> "If the House, desiring deliberately to make this bill retroactive, had added a provision unmistakably expressing such an intention, it would have been necessary to send the bill back to the Senate for the concurrence of that body in such a provision. As the bill stands now, if it be held that the House has shown an inclination to make the measure retroactive, such intention is the act of that body alone, and he has never received the concurrence of the other branch of the Legislature."

It is a novel suggestion that parties can be said not to have agreed to a contract or statute made by them because they differed as to what the effect of it would be. According to this view, if the House thought the bill would increase the revenues, and the Senate thought the bill would diminish the revenues, they never agreed on the bill. Or if a partnership agreement were drawn between A and B which expressly provided that B should have two-thirds of all profits earned after August 1st, 1894, and A signed the contract on July 3d,

1804, and B not until August 15th, 1804, B could not have two-thirds of the profits for the first fifteen days in August, because A had not expected the contract to be retrospective when he signed it.

The two Houses agreed on August 1st as the day when the new duties should take effect. Whether the bill should become a law before or after that time was immaterial, and in certain contingencies, would be beyond the control of either. But we suppose if the bill had passed both Houses on July 28th, and been signed by the President on August 5th, the contention would be made that it could not take effect on August 1st because the President was the only branch of the law-making power who had contemplated a retrospective effect for the bill.

## VIII.

**The history of prior tariff acts with reference to their provisions for time of taking effect lends no support to appellant's contention about Section 2, but, on the contrary, bears out the contention of the appellees.**

The following is a list of the *leading* tariff acts passed since the organization of the Government, with the dates provided for their taking effect:

| | |
|---|---|
| July 4, 1789. | August 1, 1789. |
| June 7, 1794. | June 80, 1794. |
| April 27, 1816. | June 30, 1816. |
| May 22, 1824. | June 30, 1824. |
| July 14, 1832. | March 3, 1833. |

| | |
|---|---|
| September 11, 1841. | September 30, 1841. |
| August 30, 1842. | From passage. |
| July 30, 1846. | December 1, 1846. |
| March 3, 1857. | July 1, 1857. |
| March 2, 1861. | April 1, 1861. |
| July 14, 1862. | August 1, 1862. |
| June 30, 1864. | July 1, 1864. |
| March 2, 1867. | From passage. |
| July 14, 1870. | December 31, 1870. |
| June 6, 1872. | August 1, 1872. |
| March 3, 1883. | July 1, 1883. |
| October 1, 1890. | October 6, 1890. |

It will be seen that the practice has been substantially uniform to fix a date for the change of duties. The only two exceptions in a century merely suffice to emphasize the rule. And this rule is founded in wisdom and propriety. The question of when taxes shall be changed on every article that enters into the consumption of the people, of when a law shall take effect which touches the life of every citizen at every point, should not be left to the convenience or caprice of the executive. Cargoes may be upon the ocean valued at many thousands of dollars which may be either dutiable or free, or dutiable at a higher or lower rate according as the President affixed his signature to the bill before or after the ship reaches port. It was currently reported that vessels containing cargoes of wool, which is made free by the present tariff, were kept floating around outside of the harbor of Boston in August, 1894, by persons who did not wish to be compelled by the Treasury Department to pay duty upon the wool, waiting to see what would become of the bill. *No statute should receive a construction which places such enormous responsibility upon the Executive, if it admits of any other construction*, and Congress, in its revenue legislation, has wisely fixed in each act the time when duties should be changed, so that all three branches of the

law-making power might have a voice in saying when that time should be; and it has done so in the case of this act.

Great stress is laid by appellant on the fact that all these tariffs have fixed a future date for their taking effect. Such has undoubtedly been the almost uniform practice, and it is undoubtedly in general the better practice. But nothing is clearer than that it is a practice which is not followed in the case of this act, and the appellant does not pretend that it has. What the Government contends is that the portion of this act fixing new rates of duty was made to take effect *from its passage*, and for this scarcely any precedent can be found in the revenue legislation of a century.

And in this connection we may suggest that if Congress was moved by the great anxiety which appellant insists it was displaying throughout to make this act take effect at a *future* date, why did it not do so at any time between August 1st and August 15th? At no time in their deliberations was any intention manifested to have the act take effect on and after its passage, yet this is practically what appellant asks this Court to hold, in disregard of the plain letter of their enactment, that they meant to do and did do.

## IX.

**Enforcing Section I. according to the plain letter of its language does not involve any such mischiefs, inconveniences, impracticabilities or impossibilities as have been suggested.**

Following is an extract from the opinion of Judge SOMERVILLE, of the Board of General Appraisers:

> "It is perfectly manifest to customs experts who are familiar with the mode of procedure of assessing duties that it is absolutely impracticable to apply the law to many cases where the assessments have been completed by liquidations, the duties paid and the merchandise gone into consumption. It could scarcely have been intended by Congress that such completed transactions should be revoked or abrogated and new liquidations attempted by the Collector. This, as we have said, would in very many cases be impracticable, if not impossible, and any effort to do so would lead to inextricable confusion, to say nothing of its manifest injustice."

We respectfully insist that these difficulties are purely imaginary. For half a century collectors' classifications have been reviewed in actions at law. The settlement of the questions of law and fact involved has taken from one to twenty-five years. But one, or at most two or three suits, are tried. The rest are adjusted according to the decision. The merchandise usually goes into consumption within a few weeks or months after its importation. The duties are paid before the importer gets his goods. Yet no difficulty has been found in reliquidating the entries and making up statements for the refund. Under the present system, every time the Court of last resort gives a final decision concerning the classification of a kind of merchandise, the Board of General Appraisers get out from their files protests that have been accumulating two, three or four years and decide them. The duties have been liquidated or no protest could have been filed and no cases would be before the board. And it goes without saying, that the merchandise has gone into consumption. But no difficulty is found in deciding how the entries should be reliquidated or in reliquidating them. The character of the merchandise is usually disclosed by the invoice, and

the appraiser's return on it. And where these do not suffice, it is easy to call for samples and for such proofs as may be required to establish the character of the goods in question. In the case at bar no difficulty has been found in determining what the goods are and what paragraph of the Act of 1894 covers them, although the duties were paid on entry and the entry liquidated before the filing of the protest.

There are no difficulties attending the carrying out of the letter of Section 1, except such as may be easily overcome. The trouble is that the mind of the difficulty-seeker is like the genius of the potter described by Longfellow:

> "That which it foresees, it finds,
> "And what it cannot *find—creates.*"

It is needless to add that even if the execution of the law according to the plain reading of its letter were attended with difficulties and inconveniences, this would furnish no excuse for evading it.

## X.

### There was no need for any special provision in Section 1 as to the refunding of duties.

Sections 14 and 15 of the Customs Administrative Act provide a complete scheme for all cases in which the importer is dissatisfied with the collector's liquidation of his entry. And these sections being in full force at the time of the passage of the Tariff Act of August, 1894, there was no need of any special provision in that act for the refunding of duties exacted under the old law after August 1st. The general sys-

tem already in operation amply provided for such proceedings as were necessary to secure the return of the excessive duties. Moreover, a considerable interval intervenes between the entry and payment of estimated duties, and the liquidation. As matter of fact most of the entries of goods imported between August 1st and 28th, 1894, were liquidated after August 29th, and if the collector had followed the plain language of the statute there would have been no excessive duty exacted and no refund necessary.

The protests lodged on this question can all be disposed of with the present machinery and in the same manner as all other protests on questions of rate of duty, and no special legislation to cover this particular question was at all necessary, or, indeed, desirable.

## XI.

**The words "unless otherwise specially provided for in this act," in Section I., were inserted for an entirely different purpose, and have an entirely different significance from that suggested by the appellant.**

In the Act of 1894, as in that of 1890, the taking effect of some of the provisions changing the rate of duty was postponed to a future date.

Paragraph 121, Schedule "C," postpones the reduction of duty on tin plate to October 1st, 1894.

Paragraph 297, Schedule "K," postpones the reduction of duty on manufactures of wood to January 1st, 1895.

Paragraph 221, Schedule "N," postpones the reduction of duty on toys to January 1st, 1895.

These are the "special provisions" which are referred to in Section 1 in the words, "unless otherwise specially provided for in this act." And it is not necessary, therefore, in order to give effect to that phrase, to adopt the very extraordinary view of the seventy-second section of the act on which the contention of appellant is principally based, and which seems to have been the chief ground on which the Board of General Appraisers based their decisions.

## XII.

**The fact that in other sections of the act where the words "on and after August 1st" are used, effect cannot be given to them because of constitutional or other objections is no excuse for refusing to give effect to them in Section 1, where no such objections exist.**

To carry the sections of the act which impose penalties for selling unstamped playing cards back to August 1st, would conflict with the provision of the Constitution prohibiting the passage of *ex post facto* laws. Therefore, the appellant contends August 1st in these sections does not mean August 1st. The answer is August 1st means August 1st whenever and wherever it is found all the world over. But effect cannot be given to that meaning in the playing-card sections, because the Constitution forbids it. And if the Constitution also forbade retrospective legislation (as several State Constitutions do) that would be an end of this case, or rather this case would never have had a beginning.

[redacted]

distilled spirits, the refunding of tax on alcohol used in the arts, the defining of who constitutes a manufacturer of tobacco, and the prohibition of trusts.

It is plain that the general saving provisions of Section 73 had ample scope for application in the matter of saving rights accrued or prosecutions for acts done, without giving them the effect of nullifying in toto the provisions of Section 1 as to the date for the change of duties.

Can it be seriously contended that a *special provision* that certain rates of duty shall be assessed upon all goods imported after August 1st, 1894, is to be *abrogated* from the stable measure of the general provisions of a three-pronged "saving clause," when there is abundant scope for the latter in a large number of other matters relating to a variety of subjects.

It is a well-settled rule of construction that a *specific provision with reference to any subject shall have effect rather than a general provision* which applies to several subjects and which would operate in the absence of the specific provisions.

In Townsend vs. Little, 109 U. S., 504, at page 512, this Court refers to the

> "well-settled rule that general and specific provisions, in apparent conflict, whether in the same or different statutes, and without regard to priority of enactment, may stand together, the specific qualifying and applying exceptions to the general."

Another well-settled rule to which we have already referred under Point II, is that no part of a statute should be rendered meaningless or inoperative where such a result can be avoided.

Now, full effect can be given to the words "on and after the first day of August, 1894," in Section 1, and yet leave ample scope for the operation of Section 73. But Section 73 cannot be given the effect by which the Government contends without rendering the phrase

[illegible] on and after August 1st, 1914," in Section 2, wholly [illegible] supplying and supporting.

The trouble with the suggestion of the Government in the first of Section 22 is that it [illegible] of the case might. If goods [illegible] such

Section 2 provides [illegible] of duty for goods [illegible] from foreign countries or withdrawn for consumption on and after August 1st, 1914." Now, a [illegible] goods were, if the act did not take effect until August 27th, [illegible] by the Government on all goods [illegible] on August 26th, 1914, the Government had no power under to the higher duties provided by the [illegible] tariff. That right had accrued, as the Government contends in the brief, [illegible] when the ship brings the dutiable goods into the port of entry. If Section 22 is [illegible] would cancel the right to the old duties on goods in transit [illegible] on August 26th, should have been released, on [illegible] of the old duties. But we find the Treasury Department on August 31st, 1914, issuing the following circular [illegible]

> Treasury Department, August 31, 1914.
>
> To Collectors and other officers of the Customs:
>
> In accordance with [illegible] on and after the 26th of August, 1914, [illegible] will be governed by the principle announced in the decision of the Supreme Court of the United States in the case of [illegible] vs. Wilson (28 U. S. Reports, 328), which [illegible] to the benefit of the act of all imported goods held in [illegible] which [illegible] that the [illegible] contained, or [illegible] or in process of transportation from one port of entry to another port of entry or a port of delivery in the United States.
>
> J. G. Cannon,
> Secretary.

This circular has been uniformly followed since its [illegible], yet, if the collections were made by the

Government as to the scope of Section 72 is correct, it must follow logically that the duties are a subsidy and remission by the Secretary of the Treasury of the Government's revenue rights to a very large amount of money.

The only way in which counsel for the appellant can escape this conclusion from his own argument is to insist that while the words, "on and after the first day of August, 1894," are not operative to subject the coming down, the words, "withdrawn from warehouse," are; and this is a contention which he will hardly make.

A pertinent and significant inquiry made by one of the Judges of the Circuit Court of Appeals on the argument below may be repeated here: "If the duty in Section one were October 1st, 1894, instead of August 1st, 1894, so that the section read 'On and after October 1st, 1894, there shall be levied, collected and paid, on all goods imported from foreign countries or withdrawn for consumption, the following rates of duty,' would it be seriously contended that goods in warehouse on that date must be charged, upon withdrawal, with duties at a higher rate which had accrued upon their importation prior to October 1st, 1894?"

The coming down (Section 73) in the present act is a reproduction of Section 25 of the Tariff Act of 1890, and the latter is almost an exact reproduction of Section 19 of the Act of March 3d, 1883, and adjudications under these two acts are instructive as to the construction of the position now taken by the Government.

Section 19 of the Act of March 3d, 1883, provided:

> "That all imported goods, wares and merchandise which may be in public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in this act, shall be subject to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day."

Under this provision it was held by this Court

in Hartranft v. Oliver (125 U. S. 225) that goods on board ship in the custody of customs officers on July 1st, 1890, were entitled to enter at the reduced rates provided in the latter act. Obviously such goods were neither in the public stores nor in a bonded warehouse, but the Court gave a liberal construction to the provision. Yet nothing is clearer than that, if Section 33 corresponding to our Section 72, saved to the Government the right to the higher duties which had accrued on arrival and before the customs officers boarded the vessel, the Court would have decided that the higher duties were properly exacted.

It will be observed that in trying to escape from the inevitable logic of this decision counsel for the Government says that:

> "No such provision appears in the act of August, 1894."

But just such a provision does appear in the act of August, 1894. It is condensed into the words "withdrawn for consumption" in Section 1, but the scope and effect of it is the same, and was acknowledged so to be in the treasury circular above quoted.

But let us take up cases where the reported decision shows that this precise point was raised.

As we have already shown, Section 72 is a reproduction of Section 33 of the Act of October 1st, 1890.

Section 2970 of the Revised Statutes provided:

> "Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and

charges, and an additional duty of 10 per centum of the amount of such duties and charges."

And Section 50 of the Act of October 1st, 1890, was as follows:

"That on and after the day when this Act shall go into effect all goods, wares and merchandise previously imported, for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing, transportation or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day;

"*Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act;

"*Provided, further*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

In the case of U. S. vs. McGrath, 50 Fed. Rep., 404, suit had been brought by the United States to recover the ten per cent. provided for in Section 2970 on goods warehoused in November and December, 1889, and withdrawn after a year, and after October 6, 1890, but before February 1st, 1891.

The Court (BILLINGS, J.) said:

"If the statute of October 1, 1890, had not contained Section 50, when we consider the public reasons against implied repeals of provisions imposing customs duties, there would have been presented a difficult question as to the effect of the

general repealing clause contained in Section 55, when taken in connection with the proviso contained in that section. *But Section 50 (26 St., p. 624) has made specific provision for the case of merchandise which had been entered in bond prior to the 6th of October, 1890,* and subjects the duties upon all such merchandise to the effect of the general repealing clause. With this *specific provision* as to the duties upon goods already imported and in bonded warehouse, making them subject to no duties other than those imposed upon goods subsequently imported, *there was no 'accruing or accrued right' of the government, and no 'liability' of the importer for the additional 10 per cent.*, and the general words of the repealing section operated upon this provision of the previous statute for this duty here sought to be recovered."

And in a similar case [redacted] (*In re* Schmid, 54 Fed. Rep., 145) Judge Coxe, dealing with a similar question before him, and with his attention specifically called to Section 55, followed the decision in the case last cited, saying:

> "The language of Section 50 is too plain to admit of doubt that after October 6, 1890, no duty can be levied on merchandise in warehouse that could not be levied were the merchandise imported after October 6, 1890."

Paraphrasing the language of U. S. vs. McGrath, we say here:

> "*Section 1 of the Act of August, 1894, makes specific provision for the case of merchandise which has been imported after August 1st, 1894, and subjects the duties upon all such merchandise to the effects of the general repealing clause. With this specific provision as to goods imported after August 1st making them subject to the duties provided in the Act of August, 1894, there was no accruing or accrued right of the Government, and no liability of the importer for the additional ten per cent.*, and the general words of the repealing section operated upon this provision of the previous statute for this duty here sought to be recovered."

These decisions were both acquiesced in by the Treasury Department.

It being plain that the general language of the so-called "saving clauses" was not intended to override the specific provision for the date when the new duties should take effect, the question whether these clauses saved accrued rights of the Government, as well as those of the citizen, is immaterial.

The suggestion of Judge WHEELER on this point at the close of his opinion is certainly debatable, and while it does not become us to admit that it is erroneous, we insist that it is unnecessary to discuss or decide the point. Conceding *for the sake of argument* that the section in its general terms saved accrued rights of the Government, as well as those of the citizen, it did not save any right to duties under the McKinley tariff, because by a *special provision of a most explicit character* that right was taken away.

## XIV.

## The dates of the payment of the duties and of the liquidation of the duties are wholly immaterial in the present controversy.

As to the date of payment under the system established by the administrative law (U. S. Stat. at Large, Vol. 26, p. 187, Section 14), it is totally immaterial when the payment is made, except that in the case of consumption entries it must be made before the importer can have the correctness of the Collector's exaction reviewed, or at most within ten days after the liquidation. But in this case it is conceded that the duties were all paid before the filing of the protest,

which was within ten days after the liquidation. In the case of a warehouse entry it is not necessary under the Administrative Law to pay the duties at all until withdrawal, and an importer has a perfect right under Section 14 of the Administrative Law to protest and carry his case all the way through this Court before he withdraws the goods and pay the duties. Therein lies the difference between the present system and the former one, where the importer sued to recover money paid. It matters nothing in the present controversy whether the duties are considered as paid August 8th or August 28th, and *for the sake of argument we are quite ready to concede, as the Government insists, that August 8th, was the date of payment.* That, of course, was an "act done," but an act done subject to the right conferred by Section 14 of the Administrative Act to protest within ten days after the liquidation for the enforcement of any ground of dissatisfaction which we might have at that time, and which right was in no way modified or taken away by the Act of August, 1894.

The date of liquidation is also wholly immaterial. It happens in our case that the collector liquidated our entry after the new act went into effect. *But we have never rested our right to recover on this circumstance and wish to disavow in the most emphatic terms any intention of doing so.* If the collector had liquidated our entry before August 28th, it would have been his duty on receipt of our protest (if timely) to reliquidate it. Our position on this subject is this: **On and after August 28th, 1894, it was the duty of the collector as to all unliquidated entries of importations after August 1st, 1894, to liquidate them according to the rates of the new law, and as to all liquidated entries to reliquidate them at the new rates if the importers filed protests in due time, setting forth distinctly and specifically the grounds of their objection to his liquidation.** All this is very plain and simple, and discussions as to what

constitute payment and as to dates of liquidation simply tend to becloud the real issue here and introduce immaterial subjects of dispute.

## XV.

**The doctrine that, where an act does not become a law until after the date fixed in the act for its taking effect, it is to operate only from the date of its passage, has been repudiated in England, has never been sanctioned by any Court in this country, and is vicious, mischievous, dangerous and revolutionary in the highest degree.**

Appellant calls attention to the case of Burns vs. Carvalho, 4 Neville & Manning, 394, as holding that "a certain Act of Parliament should be construed to take effect only from the time of receiving the royal assent, although it was expressly declared it should commence on a prior date named in the act."

The statute under consideration in that case which referred to procedure on writs of error, &c., provided in Section 30:

"If any person shall sue out any writ of error upon any judgment whatsoever, given in any Court, in any action personal, and the court of error shall give judgment for the defendant therein, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error, for the delaying thereof."

And in Section 24:

"This act shall commence and take effect on the first day of June, 1833."

The Court did hold (no opinion being delivered) that

Section 30, being "prospective only in its language," did not take effect until the date of its approval, August 14, 1883.

But in Freeman vs. Moyes, 1 Adolphus & Ellis, 338, the Court of Kings Bench held directly the opposite as to Section 31 of the same act, and said that it took effect June 1, 1833.

Referring to these two cases, we find the following in Hardcastle's Construction and Effect of Statutory Law, a standard English text book, published in 1879 (App., 193):

> "It is, however, sometimes specially enacted that a statute is to commence to come into operation on some day prior to the day on which it receives the royal assent. Thus in Jamison vs. Attorney-General, Alcock & Napier, 375, it was held that 1 Will. IV., C. 49, S. 1, which enacted that certain duties should be levied from March 15, 1830, but did not receive the royal assent until July 16, 1830, operated from March 15.
>
> "It is stated in Dwarris on Statutes, Ed. 2, p. 544, and also in Maxwell on Statutes, p. 383, on the authority of Burn vs. Carvalho, 4 Nev. & Mann, 893, that 'where a particular day is named for the commencement of the operation of a statute, but the royal assent is not given till a later day, the act would come into operation only on the later day.' *This rule is not borne out by the case cited*, which merely decides that as the language of S. 30 of 3 and 4 Will. IV., C. 42, is 'prospective only,' it cannot apply to any proceeding which took place before the act was passed. In Freeman vs. Moyes, 1 A. & E., 338, a different decision was come to as to S. 31 of the same act, the language of that section 'not being in its terms prospective.'"

In Jamieson vs. Attorney-General, Alcock & Napier's Reports, p. 375, it was held that where an act provided for the imposition of certain duties on spirits from and after March 15th, 1830, and the act did not receive the Royal assent until July 16th, 1830, and cer-

tain spirits were warehoused after March 15th, 1830, but withindrawn before July 16th, 1830, they were, nevertheless, subject to the duties imposed.

We have thus shown that no such rule as is suggested is recognized even in England. *And no Court in this country has ever laid down any such doctrine.*

Let us see how such a doctrine would operate under our constitutional system.

Let us suppose Congress to pass a joint resolution or bill on March 29th, which in express terms says it shall take effect April 1st. The President does not think it ought to take effect until April 6th. If he sends it back to Congress, with a statement that he disapproves it, but would approve it if the date were made April 6th, Congress could pass it over his veto by a two-thirds vote of each house. But, under the doctrine enunciated by counsel for the Government, all the President has to do is to delay signing the measure until April 6th, and it will operate only from that date, the wishes of both houses to the contrary notwithstanding.

Take another illustration. By the Constitutions of Iowa, Missouri, New York and Texas the Governor has thirty days after the adjournment of the Legislature within which to act on bills left in his hands. Suppose the Legislature to enact on April 27th a bill with a provision that it shall take effect from May 1st and then adjourn. The Governor signs the bill May 25th. According to the doctrine of appellant the bill operates only from May 25th.

The Constitutions of Maine and Mississippi allow the Governor, where bills are sent to him within five days of the adjournment of the Legislature, to have until the third day after the opening of the next session of the Legislature to act upon them. According to appellant's view, if they finally become laws they speak only from the time they became laws, however explicit may be the provisions contained in them as to their taking effect at an earlier date.

Is it not quite apparent that **the effect of ap-**

**pellants' contention would be (to the extent of the time allowed the Executive for his action) to convert the qualified negative, which is the only kind allowed the executive under our Republican system into an absolute veto power.** In certain contingencies and within certain limits the executive might enforce his opinion as to the time of an act taking effect against the will of both branches of the Legislature, though they might be substantially unanimous. In this country, when the executive and the Legislature are often opposed, politically, this would frequently cripple or paralyze the legislative branch of the Government. Thus, in the State of Michigan to-day all the members of one branch of the Legislature, and all but one of the other branch, are members of one political party. Conceive an executive of the other party armed with the powers contended for by the Government, and what becomes of representative government?

*Is not this doctrine a most startling and dangerous innovation in our constitutional jurisprudence?*

Our constitutional governments have been subjected to many severe strains of late, but we have had nothing more dangerous than the doctrine that, by delaying his action upon a measure, the Executive can have it take effect at some other date than that which the other two branches of the law-making power have concurred in fixing.

## XVI.

**The correctness of the contention of the Government is certainly not free from doubt, and of that doubt the importer is under the authorities entitled to the benefit.**

"Duties are never imposed upon the citizen upon doubtful interpretations."

Adams vs. Bancroft, 3 Sumn., 387.
U. S. vs. Wigglesworth, 2 Story, 373.
Powers vs. Barney, 5 Blatch., 203.
U. S. vs. Isham, 17 Wall., 504.
Hartranft vs. Weigmann, 121 U. S., 616.
Ross vs. Barland, 1 Pet., 667.
Vicksb. vs. State, 62 Miss., 107.
Hedden vs. Iselin, 31 F. R., 269, top.
Amer. Net & Twine Co. vs. Worthington, 141 U. S., 468.

## XVII.

### The Court should not usurp the functions of legislation.

In Poor vs. Considine, 6 Wall., 480, this Court thus lays down the rule:

"Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating, we should legislate. That we have no power to do. Our function is to execute the law, not to make it."

It is needless to multiply authorities. And nothing is plainer than that *this Court is asked in effect to amend this statute by expunging from Section 1 the words "on and after the first day of August, 1894."* The Government *arbitrarily assumes* an intent and then asks this Court to give it effect, in contravention of the plain, clear and unequivocal language of the law.

## XVIII.

**The first question certified by the Circuit Court of Appeals for the Second Circuit should be answered in the negative, and the second and third questions in the affirmative.**

Dated Washington, May 20th, 1895.

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